JOHN J. PERSHING

AMERICAN BAR ASSOCIATION JOVRNAL

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The pursuit of the criminal is so fascinating to so many that the perpetrator of the perfect crime is usually caught. But the defaulter has usually spent his illicit wealth before he gets in the toils.

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Our Cover—

It may be a surprise to some of our readers that General Pershing who became so great a soldier, was also a lawyer; that the ambition of his youth was to practice law and when the days of peace followed the war with Spain and it seemed to him and all of us that there would be little more work for soldiers, he studied law, was admitted to the Bar, took the lawyer's sacred oath and planned to leave the Army.

The lawyer and the soldier have much in common. Perhaps the attributes would have made him great in the practice of the law if he had followed his youthful intention.

Supreme Court Opinions

Arthur A. Ballantine, of the New York Bar, writes of increasing dissents and the disregard of ancient landmarks.

Brockington's Reminiscences

The eloquent address of the Honorable Leonard W. Brockington, K. C., of Canada, at the last Annual Meeting loses no interest in cold print.

Full Faith and Credit Clause

Mr. Justice Jackson's Cardozo lecture on the Full Faith and Credit Clause is reviewed by Walter P. Armstrong of the Tennessee Bar.

Books for Lawyers

The leading review is by Judge Manley O. Hudson, who writes trenchantly of Brierly's authoritative analysis of "The Outlook for International Law." The book and the review are also commented on in an editorial. Walter Armstrong brings back nostalgic memories, with his review of Hanbury's "English Courts of Law." Joseph Bear reviews "Injury and Death Under Workmen's Compensation Laws," by Samuel B. Horovitz, which the reviewer terms "a compensation 'bible'." Information is given of other books which may be of interest and help to lawyers.

Practising Lawyer's Guide

This department contains the usual grist of pithy analyses of law review articles which are noted because of their worth and potential usefulness to lawyers in their professional work.

Reviews of Recent Supreme Court Decisions

This month the lead is given to the case for which the patent Bar has been waiting. It deals with a conflict between the limits of lawful patent monopoly and the unlawful monopoly forbidden by the Sherman Anti-Trust Act and the Clayton Act.

The power of the National Labor Relations Board to shape its remedies and the effect of Rule 65 (d) of the Federal Rules of Civil Procedure are discussed in the *Regal Knitwear Company* case.

There are several important cases in labor law, particularly *Thomas* v. *Collins,* in which the Texas statute prohibiting labor organizers from soliciting memberships for labor organizations without first obtaining an organizer's card was said to restrain rights of free speech and free assembly.

The Supreme Court: Principles and Personalities

by Arthur A. Ballantine
OF THE NEW YORK BAR

It is no longer news that the value of judicial precedent as a guide to future decisions has greatly depreciated in the last few years, at least in matters of Federal law. The Supreme Court of the United States has manifested a growing tendency to reopen the merits of any question, even though already ruled on in an earlier case.

There is a special reason, of course, why the Court might decline to apply a strict rule of *stare decisis* –"let the decision stand"—on constitutional issues. There the Court's decision is final, and if it were unwilling to entertain a contention that a prior decision had been wrongly decided, errors could be corrected only by the cumbersome process of constitutional amendment.

Since about 1938, however, the idea of fresh review has been more and more freely extended to areas of private law. The result is that the problems of the business man, and of the lawyer who advises him, have been seriously—and I think unnecessarily—complicated. It is difficult enough, in the planning of a corporate reorganization or the operation of a trade association or the financing of a new venture, to take account of all the applicable rules of law enunciated by the statutes and the decided cases. It is virtually impossible also to consider the myriad ways whereby the Supreme Court may make retroactive changes in the rules of the game, changes which may stultify the whole transaction.

Enough has been written and said on this subject, and I must resist the temptation to discuss it further. Instead, I should like to examine briefly a parallel and related development which has intensified still further the uncertainty created by the cheapening of judicial precedent: the tendency of the Court to register a split vote—to extreme individualization of judicial opinion.

Fragmentation of Opinion

It is actually becoming unusual for all the Justices to join in the so-called "opinion of the Court." It happens not infrequently that votes of the Justices are divided three or more different ways, so that there is no clear majority in favor of any single ground of decision. The exchange of views on opinion Mondays is coming to resemble the debates on the floor of Congress.

These debates, of course, provide rich material for research in the fields of law and political science. What has happened is that discussions previously cloaked in the secrecy of the conference room are being thrown open to the public. Most of the Justices are lawyers of exceptional stature, and the exposition of their differences of view is accompanied not only by penetrating and scholarly dissertations on the principles of government but by a brilliant display of the technique of the practicing advocate.

One might suppose that this is an entirely wholesome thing—that any such increase in our knowledge of the views of the individual Justices would give us deeper insight into their patterns of thought and enable us to predict more confidently how the Court will decide future cases. This would indeed be true if *stare decisis* had been thrown completely overboard. Lawyers would then analyze each problem not in the light of principles laid down in the past, but on consideration of the views of the current personnel of the Supreme Court. If such analysis had to be made every time a client asked for a legal opinion, it would indeed be helpful to have each Justice place his ideas on record as quickly and fully as possible.

But *stare decisis*, though impaired, has *not* been jettisoned. That principle cannot be unless the whole character of our jurisprudence is to be altered. The practical result of this atomistic tendency is therefore to decrease rather than increase predictability of future decisions. The way this works out can be shown by an examination of some actual cases.

The Stock Dividend Decisions

Consider the recent decision on the old question whether stock dividends are taxable as income to the stockholder. In 1917 *Eisner* v. *Macomber* held that a dividend of common-on-common stock is not income, and therefore not constitutionally subject to our income tax, because there is no segregation of property by the corporation for the stockholder; the corporation parts with no assets; nothing is received by the stockholder for his separate use and benefit; nor does the dividend alter the proportionate interest of the

stockholder in the corporation. Shortly thereafter Congress amended the tax law to exempt *all* stock dividends from income taxation. In 1936 the Court ruled that a dividend of common on preferred is constitutionally taxable, and the tax law was amended to provide that stock dividends are taxable to the extent that they constitute "income" within the Sixteenth Amendment.

Against this background, two questions arose: (1) whether a dividend of common on common is taxable—that is, whether *Eisner* v. *Macomber* is still good law; and (2) whether a dividend of preferred on common is taxable where the stock is so held that the dividend does not change the relative participating rights of the stockholders in the corporate assets. Cases involving these questions reached the Court in 1942 and were decided in March and April 1943. In *Helvering* v. *Griffiths*, 318 U. S. 371, the Court held that Congress did not mean to alter the *Macomber* rule, so that regardless of any constitutional question a dividend of common on common is not taxable. Subsequently, in *Strassburger* v. *Commissioner*, 318 U. S. 604, it held that a dividend of preferred on common is not taxable where the relative rights of the stockholders are not changed, this situation being held indistinguishable from the case of common on common.

The interesting thing about this second decision is that, though there was no change in the personnel of the Court, the case would probably have gone the other way if it had been decided two months earlier. The reason for this can be brought out by a closer examination of the views of the individual Justices. In the *Griffiths* case, Justices Douglas, Black and Murphy dissented on the ground that Congress intended to, and constitutionally had power to, tax a dividend of common on common. In the *Strassburger* case Justices Reed, Frankfurter and Jackson dissented on the ground that a stockholder receives income upon the distribution to him of stock of a different type from that which he held before, whether or not his relative participating rights in the corporate assets are thereby altered. Chief Justice Stone and Justice Roberts were the only members of the Court who agreed with both decisions.

It seems clear that Justices Douglas, Black and Reed voted against the tax in the *Strassburger* case only because they considered themselves bound by the *Griffiths* ruling (with which they had disagreed). Had the *Strassburger* case been decided first, there would in all likelihood have been a 6 to 2 vote against the taxpayer—Justices Douglas, Black and Murphy going on the ground that all stock dividends are taxable, and Justices Reed, Frankfurter and Jackson reasoning that receipt of a new type of stock is taxable income.

Given this three-way split in the Court, a lawyer would have found it very difficult to advise a client whether or not to pay a tax on a dividend under the facts of the *Strassburger* case. Even if he had been fully aware of the attitude of each of the individual Justices, he could hardly be expected to base his advice on the fact which ultimately proved determinative—that the *Griffiths* case would be decided first. The only possible advice would be—litigate!

Taxation of Airplanes

Another aspect of the uncertainty created by such fragmentation of opinion is illustrated by *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, decided May 15, 1944. That case presented an old problem in a new setting. The question was whether Minnesota could levy a personal property tax on a fleet of airplanes belonging to a Minnesota corporation, used in an interstate transportation business. The objection was that other states serviced by the airline might also impose such a tax, and that the resultant multiple taxation would place interstate airlines at a disadvantage as against competing intrastate businesses.

At least five members of the Court held the view that the commerce clause forbids such multiple taxation. Yet because of the inability of this majority to come to agreement on a *ratio decidendi*, the actual decision is to the effect that multiple taxation is permissible.

There were four opinions. Justices Frankfurter, Douglas and Murphy held that Minnesota could tax because the taxpayer corporation was domiciled in that state. Justice Black voted to uphold the tax on the broad ground that the Court should not act to prevent multiple taxation of interstate air transportation in the absence of Congressional action. Justice Jackson concurred, on the entirely different theory that Minnesota was the fleet's "home port." He also declared that no other state should be allowed to impose such a tax. Chief Justice Stone, joined by Justices Roberts, Reed and Rutledge, favored application of the familiar rule which the Court has developed in connection with railroads—that each of the states in which an interstate transportation system operates can levy a fractional tax based on some fair apportionment of the value of the system among the interested states. These four dissenting Judges voted to hold the tax invalid because it was based on the entire value of the fleet, without apportionment.

It follows that, although Justice Jackson and the four dissenters agreed on the main point—that multiple taxation is not permissible under the commerce clause—multiple taxation is still entirely possible. For if other states impose an apportioned tax on the same fleet, it can be expected that at least a majority of the Court—Justice Black and the four dissenters—will vote to uphold them. An unapportioned tax by a non-domiciliary home port state would also be upheld if Justices Frankfurter, Douglas and Murphy—who have not yet expressed their views on this point—should agree with Justices Jackson and Black, who have already declared themselves.

As a result of the quadruple split in the Court, the law on this important subject is a crazy patchwork, explainable on no consistent theory.

But the confusion will be deepened upon any change in the personnel of the Court. The validity of an apportioned tax by a non-domiciliary, non-home-port state, which now seems clear, will become doubtful upon the retirement of Justices Roberts, Black, Reed, Rutledge or the Chief Justice. Upon the retirement of Justices Roberts, Reed, Jackson, Rutledge or the Chief Justice, a non-apportioned tax by a non-home-port state, which now seems clearly invalid, may be upheld if the new Justice so votes. And on the retirement of Justices Black, Douglas, Murphy, Frankfurter or Jackson, the authority of the *Northwest Airlines* case itself will be highly dubious.

The Insurance Case

Further insight into the difficulties besetting the business man and his legal counselor is provided by a consideration of the opinions in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). That case involved two questions: First, whether Congress can constitutionally make the federal anti-trust laws applicable to the insurance business; and second, whether, as a matter of statutory construction, Congress intended the Sherman Act to apply to such business. For three-quarters of a century it had been accepted as the settled doctrine of the Court that insurance is not "commerce" within the meaning of the Constitutional provision. It would follow that a federal statute designed to regulate interstate commerce could not validly apply. The doctrine which had been so understood was overruled without a dissenting vote.

There was great disagreement, however, as to whether the Sherman Act, passed in 1890 when the insurance business was thought to be beyond the scope of federal regulatory power, was intended to apply. Of the seven Justices who participated in the decision, four held in the affirmative. Chief Justice Stone and Justice Frankfurter were of the contrary opinion. Justice Jackson took an intermediate position, to the effect that the Sherman Act forbids only activities not authorized by state law.

The practical consequences of this decision have been tremendous. For example: In the last seventy-five years the states have erected a vast regulatory machinery, financed by taxes on the activities of the regulated companies. In 1943 premium taxes alone aggregated $123,000,000. The state tax laws were enacted on the assumption that insurance is not interstate commerce, and many of them might be invalid under the relatively strict rule forbidding discriminations against such commerce.

Consider then the position of the directors of the insurance companies. If they successfully contested the collection of those taxes, the state regulatory machinery which depends on them may well be wrecked. Since Congress has evinced no interest in taking over such regulation, the result would be to turn the clock back several decades my making possible once again the organization of irresponsible and unsound companies. On the other hand, the payment of taxes of doubtful validity confronted directors of insurance companies with a difficult question of policy. When it is realized that only four of the Justices joined in the majority opinion, and that in the next case Justices Roberts and Reed might join with the three dissenters to overrule the *South-Eastern Underwriters* case and hold that state taxes and regulations are to be left intact, the problem is complicated still further.

I have mentioned three types of situations showing different aspects of the uncertainty created by multilateral divisions in the Court: (1) The stock dividend tax cases, where decision seemed to turn on the order in which the cases were decided; (2) the airplane tax case, where the majority of the Court was unable to make effective its disapproval of double taxation of interstate airlines, and where any change in the personnel of the Court would create new questions; and (3) the *South-Eastern Underwriters* case, where by vote of a minority of the whole Court the whole fabric of state insurance regulation was exposed to confusion and the prospect of endless litigation.

A fourth type of situation, which presents the problem of uncertainty in its extreme form, is illustrated by *McDonald* v. *Commissioner*, 89 L. ed. 78 (1944). In that case the Court passed on the question whether campaign expenses of a state judge can be claimed as deductions from taxable income as "expenses . . . paid or incurred . . . for the production and collection of income." Four members of the Court joined in an opinion declaring in the negative. Four others joined in a contrary opinion. Mr. Justice Rutledge concurred with the former view *without opinion*. The result is that a lawyer seeking guidance in a future case is completely in the dark as to the views of the Justice who holds the deciding vote. All that is known is that he disagrees with both the published opinions. A decision rendered without any published opinion whatever would have been just as instructive.

Unpracticability of Decision

The cases which I have reviewed are not isolated instances. The overall situation can be indicated by some statistics on decisions at the last term of Court. The Court rendered opinions in 133 cases. In 78, or about 60%, the Justices disagreed as to the *disposition* of the case—affirmance, reversal, dismissal, etc. In 68 cases, or slightly over half, there was more than one reasoned opinion, and in these 68 cases there were 73 dissents and special concurrences. In 21 other cases there was disagreement with the opinion of the Court without any explanation of the reason for disagreement—in 16 there was dissent without opinion and in five others there was concurrence in the result only. These figures do not include two opinions on denial of rehearing, from one of which there was a dissent without opinion.

As a practicing lawyer, I know at

(Continued on page 167)

Reminiscences of Stirring Events and Scenes in World War II

by the Honorable Leonard W. Brockington, K. C.,
OF CANADA

Immediately after he addressed the Annual Dinner of the Association in Chicago last September, the Honorable Leonard W. Brockington, K. C., of Canada, left for the East Coast, on his way to England and the battle-fronts of Europe. He had then no opportunity to check the stenotype transcript of his address. Because of its many geographical, historical and literary allusions, the Journal felt it should not be published without his verification, though this meant delay until after his return to Canada. Because Mr. Brockington's humor and spirit of unity among the Allies is timeless, we publish his eloquent address in full, at first opportunity.

I suppose that an unrepentant and unashamed Britisher, arising to speak in the City of Chicago, naturally feels a little of that sinking feeling—a feeling, perhaps, in short, a little like that of Daniel in the lion's den. But your kindness overwhelms most of my initial fears, for, to tell the truth, I never saw a meeker troupe of lions, who can roar as gently as any sucking dove, nor a more engaging pride of lionesses. I can only assume, therefore, that we —this diffident Daniel and you benevolent lions—find ourselves in the predicament outlined in that lovely little poem,

> Daniel in the lion's den
> The lion was as meek as a spaniel;
> Daniel didn't give a damn for the lion
> And the lion didn't give a damn for Daniel.

It is a great pleasure for me, after many wanderings and on the eve of my last wartime pilgrimage, to find myself once again amongst the old familiar faces of the American Bar, where we, your guests and you, all cherish the same traditions, honor the same great men, and where so many of the same tender little familiar things of life beckon us across all the gulfs of time and space. I think we laugh at the same things, too, and in Canada we don't even despair of the humor of the English. They sometimes see jokes which you don't.

I was told the other day of an American soldier walking down Whitehall. He met one of those immaculate Englishmen whom I once called an icicle with a monocle. He said to him, "Say"—as he looked up and down Whitehall — "which side is the War Office on?"

"I say, old top, that's perfectly priceless! You Americans have a sense of humor."

American Lawyers Met in Many Places

I have seen quite a lot of American lawyers in many places since we last met together. I have seen them in the rubble of old London, on the steaming islands of the Pacific, and not least in a hotel which shall be nameless, where a little while ago the Bar of Buffalo most cordially saluted the entente between our two countries. That hotel must be the one that Alexander Woollcott once referred to as the Hotel de Gink, where he said there were only two rules: 1. No opium smoking in the elevator shafts; 2. Guests are requested to bury their own dead.

As I wandered from room to room and floor to floor with the last of the Mohicans from the peninsula of Niagara, I found myself repeating, "His spots are the grace of the leopard, his horns are the buffalo's pride," and, in the immortal words of Mr. Churchill, "Some Buffalo, and some horns!"

Now, you will pardon me tonight if I am in a bit of a reminiscent mood, for the lamp of memory has a long wick and your genial welcome only feeds the gleam. With recollections that run from Boston in 1936 to Philadelphia in 1940, and now to Chicago in 1944, it seems to me that there is some subtle connection with my humble visits and certain momentous events in your history.

It is related of Calverley, the English comic poet, that when he was at Oxford or Cambridge—for he was at both until he left at the request of the management—he was once summoned by the Master of his college.

"How is it, Mr. Calverley, that every time I look out of my window, I see you playing leapfrog over one of the posts in the quadrangle?"

"That's funny, Master," said the poet, "every time I play leapfrog, I see you looking out of the window."

Ladies and gentlemen, every time I come down to the American Bar meeting, I find a certain gentleman running for President. Although I don't suppose he ever says to his lady, if she happens to be home on those occasions, "Funny, whenever I run for President, that tall, handsome, golden-haired lawyer from Canada comes up to the American Bar meeting." Well, anyway, I hope you won't stop asking me because of the rather miraculous synchronization of these two unusual phenomena. And you can't blame the White House for me. You have to hang it on Joe Henderson and Olive Ricker.

For better or for worse, here we are again in this resilient land where there are more speeches to the square meal than anywhere else in the world. In the welter of problems which threaten to overwhelm us, let us smile wistfully at each other and, not taking ourselves too seriously, say with James Russell Lowell,

> Well, it's a mercy we got folks to tell us
> The rights and the wrongs of these matters. I vow
> God sends country lawyers and other wise fellers
> To start the world's team when it gets in a slough.

Canada's Appreciation of George Wharton Pepper

Before I bring you greetings from the two Bars which I have the honor to represent and to share with you, as your President has asked me, a few reminiscences of our great comradeship in arms, I ask your gracious leave to make a slight digression.

It was once said of someone—I think of Robert Louis Stevenson—that when he entered a dining room or a drawing room, it was as though another candle had been lit. I know that your English and Canadian brothers in the law who in recent years have been honored by your invitation and warmed by your welcome have always considered the living inspiration and noble eloquence of George Wharton Pepper amongst the richest of their experiences and the most enduring of their memories. This distinguished scholar, happily ageless, walks in the proud procession and direct succession of the great men who have ennobled our calling. When he comes into a gathering of lawyers, it is as though many lamps were lit, for it has always seemed to me that his ardent and glowing spirit is an illumination to all who follow in the pathway of justice and the footsteps of her handmaiden, our mistress, the law.

May I, then, at the outset, bring to him the grateful homage of the Bar of Canada, whom he recently visited, and tell him that we wish him what I believe he would most wish for himself, many more years of labor in the service of his fellowmen.

The Proud Kinship of the Bars of Canada, Great Britain and the United States

I thank you, Mr. President and members of the American Bar, for this opportunity to share once again a precious association, to join with you in the reaffirmation of an ancient and undying faith and the reconsecration of a brotherhood that has flourished, flourishes and deserves to flourish because it has always been inspired not merely by a wish to widen and deepen personal friendships, not only by a determination to safeguard freedom and progress under the law, but I believe by a desire to strengthen the visible and invisible bonds that draw together what is to me at least the proud kinship of the Bars of Canada, Great Britain and the United States of America.

May I begin, then, by bringing you greetings from the Canadian Bar. I remember about three years ago being honored by an invitation to make an address on the American radio on the occasion of your Fourth of July celebration. Amongst the kindly letters that one receives on those occasions, I got a letter from a man in San Francisco who, after describing the scene as he watched the sun setting behind the Golden Gate of that lovely city, said, "In the geography of the map, the distance from Montreal to San Francisco is very great, but in the geography of the heart, it is so small that it cannot be measured."

How close that geography of the human heart is today, when we see all around us consultation, complete cooperation and comradeship-in-arms wherever the ashes of our sons lie mingled by land and seal I am sure that I voice the prayers and the faith of my fellow Canadians when I tell you that you and we who have been doomed "to go in company with pain and bloodshed" may yet fulfill the poet's prophecy and turn our necessity to glorious gain for all the children of men.

Fraternal Greetings from Canada and Great Britain

It is with a deep satisfaction that today, in the City of Quebec, near a spot where Canada's national destiny was determined, in the last battle between English and French on this continent, the Battle of the Plains of Abraham which gave two great men a common fame because they shared a common death fighting for their motherlands, forthright men from Britain and America are meeting to direct the storm against all that remains of the strength of our common enemies.

We are always happy to be the meeting place of the two nations closest to our affections—that equal temper of heroic hearts, the United States of America and Great Britain. In the family Bibles of both our nations are written the names of nearly

Honorable Leonard W. Brockington, K.C.

all the races of the world. And for this, among other greater reasons, we Canadians welcome every glimmer of consciousness of human solidarity for we know of no greater hope for the world than your refusal to cherish ancient animosities and suspicions and no better promise of victory in war or justice in peace than the union of the tenacity of Britain and the audacity of the United States and the continuing association of the divine patience of the ancient land of Britain and the equally divine impatience of this great republic.

And so, I bring you fraternal greetings from your cordial neighbor and your tried and trusted friend, Canada, who believes that as long as we are joined in a union, not of parchment, but of men's hearts and minds, the debt of humanity to every race will be paid with reverence and there will grow in every soil sanctified by our common sacrifices a passionate belief in human freedom and the institutions that preserve it. The test of brotherhood, my friends, is a long journey, and we are going to travel together, I hope, for a long time and to many far horizons.

Now, may I bring greetings, too, from Britain—without specific delegation of authority, it is true, but, I am sure, with the sincere unspoken wishes of those of whom I shall speak to you.

The Home of Sir Norman Birkett

A few weeks ago, I spent a day or two in a house in the English countryside. It was surrounded by meadows shining with the small rain that lately had fallen and serenaded by a symphony of blackbirds and thrushes and cuckoos calling in the neighboring woodland. In the blue distance were the Chiltern hills and beneath them a battlefield, now covered with the reconciling mercy of the green grass, where once Cavalier and Roundhead fought to fashion the pattern of English liberty. Nearby, a short walk down a winding lane, was the cottage where the blind Milton asserted eternal providence and justified the ways of God to man; for there he wrote "Paradise Lost." A few steps further on was the old Jordan's meetinghouse, its walls still strengthened by the original oak timbers from the Mayflower—its little green plot the last resting place of William Penn.

In another direction not far away was the house of Edmund Burke, and, still standing, the avenue of beech trees between which he walked as he pondered the ravages of Europe in the tumult of his days.

My friend's house was your friend's house, for it was the house of that great-hearted gentleman, twice the guest of this Association, who, but for the exigency of war, would be standing in my place tonight—Sir Norman Birkett.

Two days before I left England, I sat with Mr. Justice Birkett in the High Court of Justice—the robot bombs had hardly begun to fall and they had not yet fallen on that building—and watched the unfolding of a libel case under the careful and courteous supervision of the Judge. Before the luncheon hour, I walked with him past the rubble of Goldsmith's grave, and the ruins of the Temple Church where once the little foundlings sang, and the scarred timbers of the Hall of the Middle Temple where the first Malvolio frowned on the cakes and ale of the first Sir Toby.

After lunch, we were joined by several others of your former guests from England and we talked of many things—of pride in the perished beauty around us, of the rebuilding of the ancient landmarks of our calling; of sons and friends and brothers in the law fighting in distant places and, not least, of Canadian and American hospitality and friendships gratefully and vividly remembered.

In the name of those, your guests, of bygone days, who so often recall you, may I by proxy bring you greetings across the seas that your sons have bridged.

What a Lawyer from Britain Would Say

I want you to imagine for a few minutes, if you can, that a lawyer from Britain is standing in my place and speaking to you. He would have been a man with wisdom in his heart and the grace of words upon his lips, calm of speech, of demeanor, undismayed. Since war came to his country, he has carried on his task in the courts, holding the even balance of justice though the heavens fall around him. To his duties as a judge or an advocate, there have been added many wartime tasks, works of mercy and, above all, of watchfulness against the enemies of freedom without and not less against the enemies of freedom within. In his face you would probably see, if you looked very closely, the dry-eyed memory of suffering and grief, and through his words there would run pride in the unsullied majesty of the Law of England and joy in its great brotherhood, of which he and we of North America are the beneficiaries and living witnesses.

He would begin his speech, I believe, with a contrast between the days that are gone, when his country and the lands of the Commonwealth stood almost alone in a fight that looked hopeless to all but them—between those days and this time of growing deliverance, when "out of the darkness has come a great shout and out of the abyss has risen a great tower." He would rejoice that the Wagnerian twilight of the gangster is passing into the total eclipse of the pagan gods, that the framework of the Temple of Justice is beginning to rise on the ruins of the New World disorder.

A Toast to the Future of Free France

His first tribute—for, true to his kind and his kindred, the chivalry which he learned from his Celtic and Norman ancestors, would find a place in his heart—his first tribute would be to France, the home of the franchises of the human spirit, France, who, praise God, "has found a way out of her wrack to rise in"; to her humble citizens whose shelter and generosity never failed the excaping British and Canadian soldiers who found themselves in her midst; to Paris freed by the might of steadfast allies, but not least by the courage, anger and faith

of her own sons.

Mindful of her ancient sorrows and her present joys, perhaps he would remember a toast to England after the last war and mold it to the resurrection of France as the horn of Roland winds again on her hills and in her valleys. "Let's couple the future of free France with the past of free France, the glories and victories and triumphs of the past and the sorrows that are over, too. Let's drink to her sons who made part of the pattern and to the hearts that died with them. Let's drink to the spirit of gallantry and courage that made a strange heaven out of unbelievable hell. And let's drink to the hope that one day she will find dignity and greatness and peace again."

The Sons of Canada and The Commonwealth

I think he would speak with a little pride of the sons of Canada and the Commonwealth.

> From little towns in a far land they came
> To save their honor and a world in flame.

And, remembering, the noble words spoken by a great and good Englishman, thus he would capture their letter and their spirit, applying to you no less than to Britain's sons this memorable utterance:

"From the uttermost parts of the Commonwealth they have come to honor their uncovenanted bond, obedient to one uncalculating purpose; and the fields of their final achievement, where they lie in a fellowship too close and a peace too deep to be broken, are the image and epitome of the cause for which they fell. They have not feared to enter the darkness, because they walk by a light that is in themselves, which burns and shall burn unquenched wherever their ashes lie mingled by land or sea."

He would, you may be sure, salute the transcendent glory that shines on land and sea and in the firmament of heaven in these great days—the United States of America—great and generous of heart, resilient and dynamic in action, ordering its divine anger and marshalling its titanic strength for the good of all the earth and the lasting peace of her turmoiled children.

Nor would he forget China. Wonder would speak on his lips and gratitude well from his heart for the patience of China's suffering, and the great march of the indomitable legions of miraculous Russia.

Nor would he forget the tribulation of the little beleaguered lands beside which the devastation and sorrow of his own island were, he would say, but small things with many compensating circumstances for satisfaction and thankfulness.

A Briton's View of His Own Land

He would speak of his own land simply and without vainglory; of a free people who never despaired because they did not fight in chains; of their loyalties to their allies; their laws and their own ancient traditions of steadfastness rallied by noble words from their great past. He would talk of a race that hated restrictions more than any other, cheerfully bearing them equally and without complaint; of hearts never bowed down, of energies that never flagged; of spirits that never grew dim but only glowed the more brightly in the midst of difficulty and disaster; of soldiers and sailors and airmen who fought on many hopeless frontiers in the darkness and never worried whether the limelight shone on them, caring not for credit but only for the victory of our common cause, and willing to bear the hard brunt of any fight.

He would tell of a land where freedom of speech still prevails; where no man has been imprisoned merely for the things he thought or said; of men and women forgetting the grievances that breed impatience in the griefs that bring patience; of little men in battered streets "who put on England's glory like a common coat"; of boys with simple courage "that was half joy in living and half willingness to die," rivaling the brave of all the earth; of millions of good hearts that conquer ill fortune.

If he were here I would tell him that the true heart of America knows those things, and that this great land whose revolution is not yet ended, was an unprecedented adventure in faith in the ordinary men and women of every race in the world; that this land will not allow to grow dim that faith so splendidly rekindled. And I would remind him as I remind you that it was an artist of his brave Island who painted Hope blindfolded, astride the world, and drawing a broken melody from the one remaining string of her shattered lute. And that in that sign in these dark years she has conquered, for the world still walks in the light of London and of Coventry, and must forever stand indebted for the "home of freedom disenthralled, regenerated, enlarged and perpetuated."

Now, ladies and gentlemen, during the last three years I have been a lucky man. I have travelled in many far places, and at your President's request—and I hope I do not bore you—I will draw from the rag-bag of my memory a few strands.

Strands from "the Rag Bag of My Memory"

My first memory is of the first day I landed in England shortly after Pearl Harbor. On the first night I visited the worst-bombed district of London, the shattered Dock End, where I went to see a mystery play of the Christmas story. It was acted by Austrian and German refugees in one of the few buildings still remaining standing down by the London dock side.

They dressed in clothes provided by the poor—an old dress or two, Aunty's old shawl, a few curtains—and the audience were the children of the neighborhood many of whom had never seen any sort of theatrical performance before. They cheered everything, including the benediction. And I remember at the end, on the spontaneous suggestion of the children themselves, somebody passed around a hat. In it were collected in pennies and halfpennies, seventeen shillings and four pence Ha'penny, for the distressed of Pearl Harbor.

I remember when I came back from England travelling along one of

those grand roads that you build with so much imagination. It was in the City of New York. There stood on one side a great Children's Hospital and on the other, a green playground. In the middle of the road was a sign: "The foundation of this road is the rubble from the bombed City of Bristol."

There is an image for all to see, and a dream for us all to interpret.

A War Chant in New Zealand

Not many weeks afterwards, I was with a company of Maoris in a New Zealand forest. They asked me to send their greetings to the men and women of Britain who with bare hands and no weapons fought the enemy and dared him to cross the sea. As I left with my companion, a grand American Army doctor, they sang their war chant dedicated to the sons of America. An old chief gave me the translation to tell my American friends:

> Welcome, welcome fighting men of the warrior god,
> Let us defeat the enemy forever
> When war marches over the earth
> We, too, will move to fight, to conquer,
> And to destroy.

My mind passes from that to a luncheon in London where I was a guest. It was given to the Allied Admirals by the men of Dunkirk. The chairman was Sir Dudley Pound, head of the British Fleet, who recently died. The chief guest was Admiral Stark, of the American Fleet. The hosts who filled the great body of the hall were the men who took the little ships to Dunkirk, many hundreds of them. I think it would have done your hearts good to see those men. Some of them were old sailors, some clerks out of the stores, all sorts and conditions of men, sitting at small tables, cheering the old sea dogs at the head table.

I know you would have been proud had you heard your hardened Admiral speaking so modestly and pledging the United States to unity with its Allies in war, and eloquently voicing his hopes for continued unity in peace.

The Ringing of the Bells in London

I heard the first ringing of bells that London heard since the war began. I expect I shall be back to see the first lighting of the lamps. The bells were ringing for the landing in North Africa as they sprinkled their rejoicing in the expectant air of a Sunday morning. Thousands of children were gazing in wonder where

> High over all
> Shone the Cross and the Ball,
> Of the riding, redoubtable dome of Paul

that suddenly had grown musical and merry.

And I saw many more thousands of children of all ages wistfully remembering the oranges and lemons of the bells of St. Clement Danes, and the bells of Bow that once bade Dick Whittington turn from his journey, St. Clement's and the Church of St. Mary, sanctuaries that men's wickedness had wrecked and silenced.

As I listened, I knew, too, that the great bell at Lincoln Cathedral on which is written the inscription, "Britain and America with one voice and one mind," and the other bells in the deep countryside that pious men had once christened, "Praise God and hope well," were also chiming.

As the bells spoke for us in our joys and prayed for us in our troubles, they too seemed to thank God for brave men and devoted women everywhere, for those who had worked in factory and in field to bring a victory, and not least for the comradeship of Britain and America that had brought bright promise out of Africa to a hoping and a waiting world.

I remember a great meeting in Albert Hall hallowed by many great causes, called to salute the courage of China, pledging for their assistance in the world's tomorrow, capital without greed, cooperation without patronage, brotherhood without reservation, and cheering the soldiers of China who under their leader, Chiang Kai-shek, whose name means "firm as a rock," and the inspiration of their great teacher who once said that the nation that is without faith cannot stand, have stood and still stand for the unquenched hopes of all mankind.

The Fighting Men of Nations United

I remember seeing the Australian Army back from the deserts of Libya marching through the streets of Sydney, and with the sportsmanship that joins the brave of all the earth, rallying to the defense of the United Kingdom soldiers against all mean and foolish detractors.

I have seen little mine sweepers being launched in New Zealand, where men looked out to sea where grey waters stretched unhindered to the South Pole as they sang the songs of Scotland twelve thousand miles from the land of their fathers.

I have looked into the fever-stricken faces of American Marines from the Solomons in the great hospitals in Auckland. I have seen Americans watching the surf breaking on far-away strands and thinking for and longing for the snow-swept prairies of the Dakotas. I have visited them in Iceland, Newfoundland, New Caledonia, Fiji, everywhere Americans bringing with them, wherever they went, their magnificent order and cleanliness and their resilient enthusiasms for victory.

One of my most enduring experiences was the celebration of the Battle of Britain in a mean little street in the East End of London, Single Street in Stepney. For the first time in history, men stood beneath a beautified sky cleansed of the enemy by the incomparable youth of the Commonwealth. The celebration was held in the ruins of a school. The teachers had all been killed; most of the children were playing on faraway pastures. High above the little school men had fought the Battle of Britain. To the celebration there came the mayors in their robes, the clergy in their vestments, the Grenadier Guards in their tunics to play for what children remained in the neighborhood. All around was devastation;

(Continued on page 161)

Mr. Justice Jackson on the Full Faith and Credit Clause

by Walter P. Armstrong
OF THE TENNESSEE BAR

Benjamin N. Cardozo attained his apogee while working in the metier of the common law as a member of the New York Court of Appeals. The consensus is that his tenure as a justice of the Supreme Court of the United States, concerned chiefly with constitutional questions and statutory construction, was somewhat of an anti-climax to his memorable career. Mr. Justice Robert H. Jackson had this in mind when recently, before the Association of the Bar of the City of New York, he delivered the fourth[1] of a series of lectures established in memory of Cardozo. Desiring to relate the subject to the work of the Court upon which both he and Cardozo had served, he chose the "full faith and credit" clause as the one which affords the fullest opportunity for the use of talents such as those which Cardozo so abundantly possessed. The appropriateness of the choice is manifested by the appositeness of the many quotations from and citations of Cardozo's writings.

The selection was a happy one for another reason. Mr. Justice Jackson is never more stimulating or thought provoking than when he is exploring the possibilities of some little used provision of the Constitution. In warning his hearers against permitting this clause to continue to be "the orphan clause of the Constitution" he found full scope for his pioneering spirit. There was, however, nothing visionary or provocative in his discussion. In his approach, in his conclusions and in his suggestions he was realistic, thoughtful, and, in my opinion, sound.

That the clause has from the beginning received scant attention is indubitable. "It did not have the advantage of early and luminous exposition by Marshall. No scholar has thought it worthy of a book. Text writers have usually noticed it only as a subsidiary consideration in the law of conflicts or a phase of constitutional law too obvious to require much exploration. Changing conditions of a century and a half have brought forth no new legislative implementation. The practicing lawyer often neglects to raise questions under it, and judges not infrequently decide cases to which it would apply without mention of it."

Its conception is obscure but the basic provision[2] was in the Articles of Confederation.

The Constitutional Convention, after brief and cryptic debate, extended the confederation provision to include non-judicial "public" acts and records and empowered Congress to "prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." It rejected Madison's motion to reconsider so that Congress "might be authorized to provide for the *execution* of Judgments in other States."

The First Congress provided for the authentication of legislative acts and judicial proceedings and declared that in every other state they "shall have such faith and credit . . . as they have by law or usage" in the state of their origin. In 1804 Congress included in this provision non-judicial records. This is "the entire contribution of Congress to the evolution of our law of faith and credit." It is doubtful whether the members of the Constitutional Convention or the early Congresses "had more than a hazy knowledge of the problems they sought to settle or of those which they created by the faith and credit clause."

Confusion Between Constitutional and Common Law

Mr. Justice Jackson somewhat summarily disposes of the Supreme Court's contribution to the subject. It did reject the submission of Francis Scott Key that the full faith and credit provision was satisfied by receiving a judgment in evidence to be weighed with other evidence. "The course of later interpretation may be summed up in language of Chief Justice Stone that 'the full faith and credit clause is not an inexorable and unqualified command.'" Recognized exceptions are: lack of jurisdiction may be shown though the adjudicating court found otherwise as a fact; the nature of the remedy is determined by the law of the forum; when both parties are

1. "Full Faith and Credit—The Lawyer's Clause of the Constitution". The fourth annual Benjamin N. Cardozo lecture. Quotations unless otherwise indicated are from Mr. Justice Jackson's address.

2. "Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State." Articles of Confederation, Article IV.

foreign corporations a remedy is sometimes denied; judgments based upon penalties (not including judgments for taxes) are not sanctioned by the clause.

In dealing with decisional law as to faith and credit for statutory and common law "Congress has provided no guidance as to when extraterritorial recognition shall be accorded either to a state's statutes or to its common law." As a result "there is old controversy and new confusion."

Always present is the question of "legislative jurisdiction". Although the Court has reserved for itself "how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state,"[3] it is impossible to state "with any assurance where the line is drawn today between what the Supreme Court will decide as constitutional law and what it will leave to the states as common law."

The cases do not fall into any understandable pattern: One state enacts a Lord Campbell's Act. Suit for wrongful death occurring in the enacting state is brought in another state. Recovery must be permitted.

In matrimonial causes questions of faith and credit "have usually come up only as to the effect of judgments. But not frequently these cast in terms of a jurisdictional issue what might have been an underlying question of choice of law, if raised at an earlier state of the litigation. If one of the parties to a marriage leaves the state of matrimonial domicile to seek a divorce elsewhere, a defendant might well answer—if obliged to answer at all—that such forum must give full faith and credit to the statutes of the state of actual domicile."

If the clause is to be applied to choice of law in contract cases a myriad of puzzling cases would be subject to federal review. "It is hard, however, to see why contract cases should be excluded from the benefits of a provision intended to adapt our legal systems to the needs of a national commerce."

The Bar will agree that the Court so far has furnished no effective clue to the taxpayer who seeks to escape the labyrinth of laws of assessing states. Judgments for taxes are entitled to faith and credit and it has been indicated that this sanction extends to the determination of administrative tribunals. But can the perplexed taxpayer expect the Court to determine to which state he owes his tax liability? Mr. Justice Jackson offers little hope: "But for reasons which do not seem entirely convincing to me, the federal courts have been pretty effectually closed to the aggrieved taxpayer who seeks a determination as to which of state taxing statutes rightly applies to him or his estate. We are close to holding that any tax a state has physical power to collect, it has the constitutional right to keep."

Workmen's compensation statutes have evoked the Court's most elaborate efforts to rationalize its choice of law under the clause. "Superior state interests" are declared to control the choice but there is no "consistent pattern or design into which the cases fit."

Mr. Justice Jackson concludes that there is no "field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution."

Does Our Judicial System Meet the Needs of Society?

The inaction of the Congress and the failure of the Court consistently to construe or effectively to implement the clause pose the question: Have statutory and decisional law under this clause met the needs of our society?

By this clause the founding fathers attempted to scotch the disintegrating influence of provincialism in jurisprudence by federalizing the independent state legal systems by the overriding principle of reciprocal recognition of public acts, records and judicial proceedings.

We have, however, failed to follow the way they pointed and in our legal administrations "have not achieved a much 'more perfect union' than that of the colonies under the Articles of Confederation", having "the most localized and conflicting system of any country which presents the external appearance of nationhood."

Our failure to integrate our judicial system is emphasized by the success of countries with a comparable jurisprudence. Throughout the British Empire judgments may be reciprocally enforced. Not only in the United Kingdom but in the federations of Canada and Australia are there liberal legislative provisions for the extraterritorial service of process in proper cases, due regard being given to the doctrine of forum conveniens.

Mr. Justice Jackson suggests the reasons for the contrast between our lack of national law reform and the wide legislative extension of federal powers, with judicial sanction, over economic subjects: "The calendars of successive sessions of Congress are crowded with proposals of more immediate urgency, supported by pressures greater than usually can be mustered for a law reform. . . . It seems easier for the court to put aside parochialism and think in terms of a national economy or of a national social welfare, than to think in terms of a truly national legal system. Perhaps that is because federalism in the field of faith and credit does not have the watchful and powerful championship of the Federal Government, to whose interests the justices have often been made alert by prior experience in federal office." Private advocacy upon which the federation of the clause is dependent has not always realized its possibilities or supported its submission by "the best research and understanding" or by "any extensive experience or investigation of this subject."

Although "it cannot be doubted that Congress is invested with a range of power greatly exceeding that

3. *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n.*, 306 U. S. 493.

which it has been fit to exercise," almost the only attempt to stimulate the exercise of that power was made by the American Bar Association which sponsored a bill—which died aborning—to simplify the execution of state judgments as proposed by Madison.[4]

Effect of Parochial Limitations

This is all the more surprising in view of the fact that Mr. Justice Stone once pointed out that " 'much of the confusion and procedural deficiencies' in the matrimonial field", *of which the Bar is keenly conscious,* might be remedied by legislation. There is little doubt also that Congress has the power "to prescribe the type of divorce judgment that is entitled to extraterritorial recognition." The Court has had no occasion to decide such questions but "it has been fairly ostentatious in leaving the way open to sustain such enactments without embarrassment."

Instead of accepting the invitation of the Court to provide for nationwide enforcement of state judgments Congress "has affirmatively subjected the effectiveness of judgments of federal courts to like territorial limitations. The fact is that today, except in the few cases of which the United States Supreme Court has original jurisdiction, the litigant can go into no court of the land whose judgment will have any effect outside of a very limited area, except as a record on which to sue for another judgment." Mr. Justice Jackson comments: "If such parochial limitations serve any good purpose in modern society, I do not know what they are."

Nor is Mr. Justice Jackson entirely patient with the attitude of Congress toward initial process. Although it has the power to provide for the extraterritorial service of state process so that trial may be had in the most appropriate forum, it has instead, save in some exceptional cases, impressed the state limitations upon the federal courts. As a result "nowhere else does litigation present such a multitude and complexity of controversies over conflict of laws."

"The Way Out"

From this confusion Mr. Justice Jackson boldly points a way out—a way that should be taken by the courts if Congress does not—as it should—mark the road. He rejects the "balance of interest test" as determinative of the choice of applicable laws. The doctrine enounced by the Court[5] that "a state is not required to enforce a law obnoxious to *its public policy," he thinks would* emasculate the clause.

"The policy ultimately to be *served in application of the clause is the federal policy of 'a more perfect* union' of our legal systems. No local interest and no balance of local interests can rise above this consideration." The choice of laws should be that "which best will meet the needs of an expanding national society for a modern system of administering, inexpensively and expeditiously, a more certain justice."

Domicile is the best example of the pervasiveness of the federal interest. "The constitution is indifferent as to whether a Mr. Williams was domiciled in North Carolina or in Nevada or whether a Mr. Green was domiciled in New York, Massachusetts or Texas." But "the federal interest is concerned that a Mr. Williams and a Mr. Green have some place in our federal system where they really belong for purposes of fixing their legal status and determining by whom they shall be governed."

In two instances Mr. Justice Jackson finds indications of a better trend. In that construction of the Constitution which permits a state to declare that use of the highways of a state by a non-resident operates as the appointment of a public official as agent for service of process in suits growing out of accidents occurring during such use, jurisdiction is fixed where the case may be appropriately tried "despite the defendant's absence and nonresidence." Such an extension is "almost equivalent to extraterritorial service of process."

Conversely the Court by example has suggested that courts decline cases that may more appropriately be litigated elsewhere. When the construction of state laws is involved, on substantially forum non conveniens grounds, with increasing frequency it has held cases for decision by state courts and has ordered the lower federal courts to do likewise.

To those of us who are interested in law reform and the integration of the state judicial systems the argument of Mr. Justice Jackson for an extension—legislative and judicial—of the full faith and credit clause seems unanswerable. It is difficult to see why those who at present are *critical of the extension of federal* power which has been sanctioned by the Court should object. They must realize that, despite protestations, the party nationally in power always supports the extension of federal jurisdiction. The remedy, if those of their faith obtain control, is not an attempt to restrict the potentialities of federal control but a self-denying attitude by Congress—the repeal of laws extending federal jurisdiction and the non passage of any similar acts. But with the ambit of permissible federal action so widely extended no valid reason appears for not taking advantage of the situation to integrate our judicial system. That there should be objections to this is, as Mr. Justice Jackson truly says, "the more strange since the states have less to fear from a strong federalist influence in dealing with this than with most other constitutional provisions. The Federal Government stands to gain little at the expense of the states through any application of it. Anything taken from a state by way of freedom to deny faith and credit to law of others is thereby added to the state by way of a right to exact faith and credit for its own."

We cannot fail to agree that "the full faith and credit clause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have."

4. 52 A. B. A. Reports (1927) 292.
5. *Griffin* v. *McCoach,* 313 U. S. 498.

State Department and the Bar Discuss World Organization

by Mitchell B. Carroll

CHAIRMAN, SECTION OF INTERNATIONAL AND COMPARATIVE LAW

Interest in receiving the views and support of the American Bar Association in regard to the Dumbarton Oaks Proposals was expressed by high officials of the Department of State when on October 23, 1944, President David A. Simmons, and Messrs. Murdock, Turlington, and the Chairman of the Section of International and Comparative Law, called at the Department to present a copy of the resolutions adopted by the House of Delegates on September 13, 1944. The Section therefore arranged a number of meetings in conjunction with local bar associations at which State Department officials served as discussion leaders.

The first meeting was held at the Association of the Bar of the City of New York on December 12. President Simmons opened the second meeting with the New York State Bar Association on January 19. During the third meeting in Washington, on January 27, with constituent members of the Inter-American Bar Association, the Section adopted resolutions endorsing the Dumbarton Oaks Proposals as the basis for a constructive program and making some suggestions for incorporation in the charter of the international organization. Senator Joseph H. Ball's address, at this meeting, on the essentials of a world organization, the statements by Green H. Hackworth, Legal Adviser, and Durward V. Sandifer, Chief of the Division of International Organization Affairs, Department of State (both of whom attended the Dumbarton Oaks Conference), Hon. William D. Mitchell's talk on Congressional authorization for representation on the Security Council,[1] and the views of Frederic R. Coudert, Amos J. Peaslee, Thomas K. Finletter, James O. Murdock, and others, together constitute an authoritative treatment of the Dumbarton Oaks Proposals. This material afforded a basis for discussion at other meetings, such as those in Cleveland, Detroit, Chicago, St. Louis, New Orleans, and Shreveport.

In his speech President Simmons expressed gratification over the large interest shown by lawyers in the world organization, and stressed the importance of continuing their earnest and thoughtful work and educating the people with a view to seeing that this time the treaty establishing the world organization will be ratified.

Senator Ball on the Essentials of a World Organization

Senator Ball declared that at this stage there are two primary essentials for a world organization: "The first is that our organization must have the power in itself to act to stop future attempts at aggression and future attempts to disrupt the peace of the world." It is for this reason that, according to the Proposals, our quota of forces having been previously agreed upon and assigned to the Council, the organization would go into action when the Council so decided. The second essential is the support of the larger powers, and preferably all the powers. The Senator warned that if we forget again in five, ten, or fifteen years, and tolerate violations of international law and justice, without using the machinery we are setting up to stop them and punish the violators, the new organization will fail.

Procedure in Peaceful Settlement of Disputes

After summarizing the principles underlying the proposed organization, Mr. Hackworth outlined the procedure in settling disputes: In the first place, there is an obligation upon all parties to seek a solution by peaceful means such as negotiation, conciliation, arbitration, and judicial settlement. If the parties themselves fail to reach a settlement and peace is endangered, they are then obligated to refer the matter to the Security Council, which would be bound to decide whether or not the situation is such that it should act. The Council may recommend procedures or methods of adjustment. It may ask the International Court for advice on incidental legal questions. Should a failure to reach a settlement be considered to constitute a threat to the peace, the Council could take such measures as might be necessary to maintain order, such as a partial or complete interruption of means of communication, or severance of diplomatic and economic relations. If the Council should decide that such measures are insufficient, it would be empowered to use air,

1. For a similar statement see the JOURNAL for February, 1945, p. 59).

naval, or land forces to maintain or restore peace. Such forces might be used only in demonstrations, or in pacific blockades, or they might be used in such other manner as the circumstances might require. "The Security Council might call upon all members of the organization to supply military contingents," he added, "or it might limit its call to some of them, depending upon the locality and magnitude of the threat or breach of the peace."

"The realistic recognition and allowance for the utilization of regional arrangements and procedures in the Proposals is of the greatest importance to those of us from the American republics," declared Mr. Sandifer.

Members' Views on General Features

Some of the suggestions of Section members were that the charter should more clearly provide that any nation which refuses to settle a dispute by peaceful means, or resorts to force or threat of force against another nation, shall be guilty of an offense against the community of nations. In addition, the charter should place more emphasis upon the binding effect of treaty obligations and the establishment of international law as a rule of conduct among nations, and should require the registration and publication of all treaties and conventions to which a member nation is a party.

Moreover, the charter should recognize the basic principle that one should not sit as a judge in a dispute in which he is involved and, accordingly, any nation which is a party to a dispute should be given an opportunity to be heard but should have no vote in the decision.

Although the Dumbarton Oaks Proposals are presumably not intended to maintain rigidly the *status quo*, it is felt that the charter should envisage the necessity of meeting changing conditions, and of having the Assembly take cognizance, from time to time, of treaties which may have become inapplicable, and consider rectifications of international conditions, the continuance of which might endanger the peace of the world. Furthermore, to hasten the restatement and development of international law, the General Assembly should be charged with the initiation of studies to that end.

Mr. Hackworth explained that the statute of the Permanent Court contains "the compulsory-jurisdiction" clause by which members may declare that they recognize "as compulsory, *ipso facto*, and without special agreement", in relation to any other member or state accepting the same obligation, the jurisdiction of the court in all or any of four classes of legal disputes: (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute the breach of an international obligation; and (4) the nature or extent of the reparation to be made. This clause was advocated for general adoption.

Means of Bringing the Court Closer to the Nations

Referring specifically to the proposal that world court judges should go on circuit to the capitals of member nations, Mr. Hackworth observed that: "There is much to be said for bringing the Court closer to the people and closer to the locale of the dispute. Such a procedure might follow either of two courses: one would be to have the Chamber sit as a court of first instance with a right of appeal by either party to the full court in any or in certain classes of cases, and with the right of the principal court to determine whether it should grant an appeal; and another course would be to make the decisions of the auxiliary Chamber final".

The essential idea is to have members of the World Court go on circuit to the various capitals when occasion arises, and it is immaterial whether the court so held is referred to as a circuit court or by another name, and whether such a court should consist of one judge or a panel of judges, and whether they should have regular terms. Hence, the Section voted on January 27, 1945, that the existing Permanent Court of International Justice should be continued as the highest judicial organ of the international organization and should be so organized that members of said court will be available to hold courts of specified original jurisdiction at the capitals of the respective member nations of the international judicial system.

Further Discussion Invited

The foregoing summary shows that this cooperation of the State Department and the Section has not only clarified the Proposals but also has elicited suggestions to make the organization more effective.

Law Lists

The Special Committee on Law Lists has issued a letter of intention to Mr. L. J. Ellsworth, doing business as The Underwriters List Publishing Co., 166 West Jackson Boulevard, Chicago, Illinois, for a list proposed to be issued by him, to be known as "The Underwriters List." The letter of intention will expire on December 31, 1946.

The Special Committee on Law Lists announces that the letter of intention previously issued to the Inter-American Legal Directory Company, 225 West 34th Street, New York City, covering El Registro de Abogados de los Estados Unidos de America expired on December 31, 1944, and has not been renewed by the Committee.

"Books for Lawyers"

THE OUTLOOK FOR INTERNATIONAL LAW. *By J. L. Brierly. 1944. Oxford: Clarendon Press. Pages 142. ($2.00).* This is not a treatise *on* international law. It is a small readable book *about* international law. It explains the nature of international law, describes how it operates, appraises recent efforts for its extension, and outlines the steps to be taken if it is to be "revitalized."

This reviewer has often been asked to recommend just such a book. Hitherto he has been at a loss to suggest a single suitable volume. At a time when such a welter of useless printed matter on this subject is crossing his desk, when so many men who have not lived with international law are feeling themselves called upon to expound its philosophy, when a paralyzing confusion possesses many minds, here is clarity, here is understanding of possibilities as well as difficulties, here is guiding vision. This volume is an answer to a prayer.

The author was nurtured in the traditions of the English common law. For a quarter of a century, as the Chicele Professor of International Law and Diplomacy at Oxford, he has lived both in and out of the cloisters of that great university. His publications, all too few in number, have commanded the respect and the admiration of his colleagues in many countries. For fifteen years, his work on *The Law of Nations,* of which a third edition was recently published, has served as the leading introductory book in the field.

Now what is Brierly's present outlook? First, a needed caution. International law is not "a subject on which any one can form his opinions intuitively, without taking the trouble . . . to inquire into the relevant facts." We must remember that "we do not start with a clean slate but with an existing system." Law is not a "sociological maid of all work"; it is a "highly specialized instrument." We must continually ask ourselves "how far, and on what conditions, independent states can be expected to be amenable to the special kind of control that it is in the nature of law to provide." In fact, international law is still in "the *laisser faire* stage of social development." It is "a means for enabling the day-to-day business of states to be conducted in normal times along orderly and predictable lines." It serves as "a useful lubricant" for the relations of States, though it lacks a "compulsory and unconditional" quality.

After an illuminating discussion of "war and the law," and of "vital interests," Brierly comes to the central problem of "some form of international organization which will ensure that an overwhelming preponderance of favor shall be placed behind the law." Yet "the notion that international war can be dealt with by measures in the nature of police action" rests on a false analogy. Even within a nation, the general rules of law cannot always be applied to large and powerful associations; for example, labor unions and church organizations. The society of states does not have the intimate "sense of community" on which domestic peace depends. Yet much "can be done to stimulate the growth of a closer international community feeling." Law is a powerful influence in this connection, though "it is no guarantee of peace alone."

The chapter on "Progress under the Covenant" gives an admirable analysis. It will be lost on the glib commentators who, unrestrained either by the text or the history, have glutted the public mind with their twaddle on this topic; but "historians may yet have to record" that the Covenant "marked the biggest step forward ever taken" toward the goal of international order. The principles that "war is always a matter of common concern," and that action deemed at the time to be wise and effectual to safeguard the peace may be taken by an authoritative body —both of these were sound. The importance of the "gaps" in the Covenant has been exaggerated. The chief weakness was that each state was left to judge for itself whether a state had "resorted to war in disregard of its covenants"—fortunately the Dumbarton Oaks Proposals envisage a single decision by a Security Council.

Order is not created by law, in Brierly's view. It must exist "before law can even begin to take root and grow." The future of international law "depends on the answers that events may give" to two vital questions: Can we look forward to the establishment of a reasonably secure international order, and can we hope that such an order will be a constitutional order. "Security for all can only be collective security." It is "an expensive way of providing collective security to have to improvise the system after war has begun." It is "of the essence of such a system that states should declare beforehand what they will do in future circumstances"; for "more than half the value of a security system lies in its having a deterrent effect." Precise commitments in advance are desirable, but "precision should not be bought at the expense of any uncertainty that they [commitments] will be honoured if need be." It was a mistake for the Covenant to assume that all states had an equal interest in the maintenance of international order. Some grading of States' obligations seems necessary. Smaller states have an essential role; every state can have the obligation not to assist a state which is found by an agreed procedure to be an aggressor.

Throughout Brierly returns to his emphasis on world organization

as "a prerequisite for the advance of international law," and on the institutions which such organization implies. "Military power is not a constant, but a variable factor," and "the problem of security is not one but many problems."

The author then turns to a discussion of "law and welfare." He finds that "the need for machinery such as the League provided is increasing." The unanimity rule which has prevailed is "a serious handicap," but not "a fatal one." The mere introduction of a majority rule would not overcome all the obstacles. The creation of an informed public opinion will be needed. And the possibility is envisaged that a state's treatment of its own subjects may be brought within the reach of international law. Discussing an international bill of rights and the analogy to the American bill of rights, Brierly thinks that "like most analogies between the American Union and the international society of states, this analogy is certainly misleading." He doubts the "self-evident truths" of our Declaration of Independence, and questions whether they are "even universal ideals." He sees no practicable way of enforcing an international bill of rights.

On the subject of international disputes, Brierly has written most helpfully in the past. Here the treatment is abbreviated. He finds the existing machinery of international judicature "far ahead of international organization on any other side," and in need of no major amendment. Though he cannot defend "the present freedom which states retain to submit or not submit their disputes to be decided on the basis of law," he is hesitant with reference to compulsory jurisdiction. "The distinction between justiciable and non-justiciable disputes does not help"; yet some distinction has to be drawn between those disputes which states may be willing to have decided by a court and the more important disputes which must be handled otherwise. This leads into a discussion of "peaceful change," and it is concluded that third states may influence but should not attempt to decide upon demands for a change in legal rights. States should have an obligation to submit certain disputes to an international standing conference for consideration, but not for decision. This would offer no absolute assurance that *all* disputes would be settled somehow, yet Brierly cannot find such assurance even in national institutions.

Upon a few of these points the reviewer might wish to shift the emphasis slightly, but the shift would probably add nothing to the cogency and clarity of Brierly's statement. Here is the most useful discussion of the current problems of international law which has come to the reviewer's attention, and a person who would now lead the public consideration of these problems will neglect it only at a risk of intellectual peril.

Cambridge, Mass. MANLEY O. HUDSON

ENGLISH COURTS OF LAW. *By H. G. Hanbury, D. C. L. December, 1944. New York: Oxford University Press, Pages 192 ($1.25).* This title evokes nostalgic memories of distant days. Sir Henry Fielding Dickens (that son of Charles Dickens who later wrote his delightful Recollections) is Recorder of London and sitting at the Old Bailey (Central Criminal Court).

In the Royal Courts of Justice on the Strand, barristers in faded wigs are constantly tugging at gowns that are forever slipping from their shoulders. Lord Darling has come down from the House of Lords to help clean up the docket. A running-down case affords the opportunity for the display of his mordant wit. A barrister representing a plaintiff, arguing against a motion for a directed verdict, invokes the "last clear chance" doctrine and cites *Davies* v. *Mann*.[1] "Ah," replies Darling, "That case has no application. The plaintiff is at least presumed not to have been an ass."

Lord Chief Justice Hewart, when a case involving only one motor car is stated, blandly remarks, "Then this is not the ordinary case of a collision between two stationary vehicles."

Serjeant Sullivan, one of the last of the serjeants, who defended Sir Roger Casement, cross-examines a plaintiff who claims to have been defrauded and who describes himself as simple minded. "And what might be your simple minded business?" mildly inquires the serjeant. "I'm a race-track book maker," is the unexpected reply.

The Court of Criminal Appeals holds a special session in August to hear a murder case. After counsel for the prisoner has finished his extended submission, the death sentence is affirmed from the bench, without any argument on behalf of the Crown. The crime was committed after one landed in June and the execution takes place before one sails in September.

Sir Douglas Hogg appears before the Privy Council and Sir Edward Carson before the House of Lords. The simplicity and informality of these courts is in marked contrast with the stateliness of the King's Bench Division. "There are no litigants or witnesses to be impressed," explains a barrister friend.

For an American lawyer wonderful entertainment this—better than any theatre in London can provide—sufficiently familiar to be understandable, different enough to be fascinating.

One leaves with the determination to explore the background, and spends weeks digging out the story. But here at last it all is in a single slender volume of luminous prose of rare literary distinction. Described are the origin, growth, jurisdiction, practice and procedure of the English courts, not only those that remain but those that have vanished: the Exchequer and the Exchequer Chamber whose judges were Barons though not of the peerage; the Common Pleas; the Star Chamber; and all the others.

Many of these courts and much of their procedure had disappeared before the Judicature Act of 1873;

that far reaching statute swept away much more. But there are many vestigial survivals.

Whether you are at the Old Bailey or in the King's Bench or listening to the Lord Chancellor try an equity cause or go to the court of "wives, wills and wrecks" (the Probate, Divorce and Admiralty Division), where the judge has as his aid on matters of navigation one of the Trinity Brethren, you cannot fully grasp it all unless you know how it came about. Those of us who in bygone summers were now and then lucky enough, on our transatlantic trips, to get to England before the courts rose for the long vacation are indebted to Professor Hanbury for giving memorable coherence to the many unforgettable things we saw and heard.

WALTER P. ARMSTRONG

Memphis, Tenn.

LEGAL EFFECTS OF WAR. *By Sir Arnold Duncan McNair. (1944) (Second Edition). Cambridge, England: University Press. New York: The Macmillan Company. Pages xx, 476. $6.00.*

WAR AND THE LAW. *Edited by Ernest W. Puttkammer. (1944) Chicago: University of Chicago Press. Pages vii, 205. $2.00.*

MILITARY OCCUPATION AND THE RULE OF LAW: OCCUPATION GOVERNMENT IN THE RHINELAND, 1918-23. *By Ernst Fraenkel. (1944) New York: Oxford University Press. Pages xi, 267. $3.50.*

The most useful working book we so far have, for the assistance of lawyers and courts, as to the *legal* effects of the war upon the rights of property and persons, is that of Sir Arnold McNair. Practically a new work from its first edition in 1920, it encompasses the questions with which most or many practising lawyers are or will be struggling. It has the practical qualities which are likely to keep it on your desk rather than relegating it to your shelves. The fact that its citations and approach are necessarily from English and Continental sources (although a few American decisions are cited) may be regarded as increasing its usefulness, as to the many facets of the legal problems which confront the profession in America and will test the flexibility and readiness of its members.

"Books for Lawyers" tries to denote its differentiation between books which lawyers might be interested in reading, those which they ought to read, and those which they ought to have within arm's reach and in their brief-cases when the subject-matter is pertinent. Such an appraisal is difficult, perhaps precarious; every lawyer should make his own. But "Legal Effects of War" seems to be a book for the bag. It does not profess to be "a *vade mecum* through the tangled undergrowth of wartime legislation." It does give, in a form which a practising lawyer values, the grist of material he will do well to mull through, before going to court or "sitting in" on a conference, as to any of the legal effects of the war, including enemy occupation of various countries. Its discussion of the effects of the decrees and acts of "exiled" governments is particularly pragmatic, and some American decisions are cited (e.g., 289 N.Y. 9). Contracts, negotiable instruments, insurance, and their frustration by war, are particularly well treated. Chapter 16, as to the effects of war on a lawyer's retainer, is not paralleled in anything written in America.

"War and The Law" is a brochure by eight professors of law—Dean Wilber G. Katz, Kenneth C. Sears, Ernst W. Puttkammer (Editor), Max Rheinstein, Charles O. Gregory, Edward J. Levi, George F. James, and Mortimer J. Adler—all of the University of Chicago Law School. This constitutes the eleventh of the Charles R. Walgreen Foundation Studies of American Institutions. Each professor contributed an article, prepared as a lecture, on the impact of the war on different aspects of what he sees as the law; e.g., civil liberties, alien enemies, civilian populations in relation to the Armed Forces, labor relations, international cartels, price control, military justice, and over-all legal trends and the extent to which war silences rules of law, along with the possibility that the re-establishment of law may curb wars or remove their provocations. The authors present an informed analysis of trends, but leave hardly an encouraging picture as to what the war is doing to law or as to what will be left that can be regarded as law after the war ends.

The prolific Ernst Fraenkel is the author of the timely study of military occupational government and the relation of law to it, as exemplified in, and projected from, the Rhineland Occupation during 1918-23. Although most of the material had been submitted, as a preliminary confidential draft at the end of 1943, to the governmental agencies concerned, the present publication in final form is a project of the Institute of World Affairs, jointly with the Carnegie Endowment for International Peace. Neither of those highly useful institutions identifies itself with the views expressed in the book, but the competence and dependability of the research, at a time when facts and the voice of experience are so lightly heeded, qualify the volume as a worthy and "serious attempt to demonstrate in a scientific manner the many ramifications of a problem that is as complex as it is topical."

All in all, here is probably the best hand-book which is as yet generally available, as to the legal problems inherent in restoring, by patience and common sense, the rule of law in areas occupied by military forces of America or England. Yet through no fault of the learned author, the study does not cope with the most poignant of present problems—the fact that through systematized starvation, mass-murder, ravishment and greed, as well as the suppression of all communal virility and habits of independent thought even in their own lands, amounting to the virtual

extinction of the human soul, the Nazis have extirpated even the roots and seeds of the restoration of habits of self-government according to law. The tragedy of the British experience in Greece and the futility of the Allied experience in Italy and Belgium reveal the inappropriateness of analogies to the status in the Rhineland at the end of World War I, where the population was sullen, often hostile, yet retained self-respect and was hardly sorry to be rid of the Kaiser and all his works. In areas in which the fleeing SS. have left behind roving mobs of angry, hungry, debased beings which once were human, new problems arise, for which the Rhineland experience offers little or no guide, because the capacity and the will to make or accept even the beginnings of a restoration of orderly government have in this instance been destroyed by the departed conquerors. Of what avail is it to talk of the right of peoples freely to choose their own form of government, when they use "lend-lease" weapons on each other, to prevent any stability enabling a free and ordered choice?

Nevertheless, Dr. Fraenkel's study, its bibliography, and its cases illustrating the slow struggle to restore an ascendancy of rules of law in the Rhineland, are among the best tools-in-hand we have, for this trying period in which Anglo-Saxon preconceptions that liberation should mean stability are sacrificed, for considerations which we cannot as yet appraise.

AMERICA'S FAR-EASTERN POLICY. *By T. A. Bisson. January 30, 1945. New York: Institute of Pacific Relations (Distributed by The Macmillan Company). Pages xiii, 235. ($3.00).* In this succinct study, one of our foremost authorities on international relations in Asia and the Pacific gives a vivid but objective account of the events and policies which, starting in the last century, led to Pearl Harbor.

Mr. Bisson has not written his opinions or his appraisal of American policy in the Far East. Within the compass of 165 pages of text and 65 pages of well-selected documentation, he has given facts rather than interpretations, but the implications in many instances are crystal clear. His exposition has been attested the best which has thus far been written in the particular field.

Published under the auspices of the International Secretariat of the Institute of Pacific Relations, this volume is the first in a series which will be indispensable to those who wish to have the background for an informed judgment on the many new problems which will press for solution when Japan is defeated.

ABRAHAM LINCOLN: *A Portrait by Norman Rockwell: A Litany by Carl Sandburg. Philadelphia: Saturday Evening Post (Curtis Publishing Company). Vol. 217—No. 33; page 108. February 10, 1945. (10 cents).*

> *The reviewer writes that "this is the craziest review you will ever receive." Probably we should agree with him—the reasons are obvious. But the review points a stirring message for these times.*

It has never been done before. So it is unprecedented, unorthodox, and probably heretical. For a professional journal to review a popular weekly.

By way of a cautious introductory statement, I say: "May it please the Court". We review Tutt in book form; yet equally good Tutt stories appeared in a weekly magazine. Dean Wigmore said that courts once would cite only volumes bound in calfskin, while the world of the law reviews went by. Today even federal administrative tribunals tremble before a perfectly annotated article in a legal periodical. It is told by a usually reliable source that a *note* written by a law school student and published after briefs had been printed and submitted, proved to be the best thing on the exact point in an important case before the Supreme Court of the United States.

Earnestly I submit that when any vehicle of information reaches millions of families in a democracy, it merits serious consideration.

There are great artists, poets, and writers who wish to reach those millions and rejoice that now they can do so.

What am I reviewing? A picture by Norman Rockwell. A litany by Carl Sandburg. The hope of the reviewer always is that he may bring to your attention, and induce you to read and study, the originals themselves.

I rest my case on a simple fact:

Artist and poet were both inspired by these words:

"WE CAN SUCCEED ONLY BY CONCERT. THE DOGMAS OF THE QUIET PAST ARE INADEQUATE TO THE STORMY PRESENT. THE OCCASION IS PILED HIGH WITH DIFFICULTY, AND WE MUST RISE WITH THE OCCASION. AS OUR CASE IS NEW, SO WE MUST THINK ANEW AND ACT ANEW. WE MUST DISENTHRALL OURSELVES."

These words were not written this week. They possess the sublime dignity and the awful force of true prophecy.

You will find them in the Government's archives: In the Message to Congress on the State of the Union dated December 1, 1862. Then, as now, a great war was raging. As President of the United States, Abraham Lincoln wrote the words which are quoted above.

REGINALD HEBER SMITH

Boston, Mass.
February 12, 1945

CASES AND MATERIALS ON LABOR LAW. *By Milton Handler. (1944). St. Paul, Minn.: West Publishing Company. Pages xxii, 786. With index and table of cases. ($6.)*

In the American Casebook Series, Professor Milton Handler, of the Columbia University School of Law, has put together a useful assembly of the decisions and related materials in this fast-developing field of

law. He had the assistance of Stanley A. Schlesinger.

Such a compendium would ordinarily receive a critical commentary in this department beyond this attestation of the competence of Professor Handler's work in this and other fields of scholarship. Under the conditions as to space, however, we are sorry to have to stop with the foregoing, which will acquaint lawyers with the availability and the worth of this compilation.

INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS. *By Samuel B. Horovitz. 1944. Boston: Wright and Potter Printing Company. Pages xxxii, 486, with indices. ($6.00).*

To label this as just another book on workmen's compensation is like referring to Napoleon as just another soldier. I call it a compensation "bible"– a book dealing with a subject vitally affecting 2,000,000 workers annually, 18,000 of whom die, more than 100,000 are maimed for life, and the rest recover after varying periods of disability–a terrible toll to pay for our industrial greatness. About $200,000,000 a year reaches the hands of workers, their dependents and those furnishing medical and hospital care.

Workmen's compensation laws had their inception in Germany in 1884 under Bismarck. Thirteen years later, in 1897, the idea had reached England, and by 1902 had crossed the Atlantic. Legislators here began working on this sensible theory of the responsibility of industry for its human wreckage, by the abolition of the old common law rules of contributory negligence, fellow-servant, and assumption of risk. The machine worker in a busy factory or the truck driver in city traffic could not conceivably depend on archaic rules of law formulated in the days of rural and agricultural life. The industrial age needed new rules of law for industrial injuries, and workmen's compensation Acts were the answer. They operate towards a more equitable, economic distribution of human losses, and place the burden where it belongs–in the lap of industry.

Workmen's compensation, being the first as well as the foremost of modern social security legislation affecting such a great number of people and resulting in an expenditure of such a tremendous amount of money, would seem to be a subject concerning which there should be a wealth of literature. But such, surprisingly, is not the case. Some lawyers, very few, have attempted a discussion of workmen's compensation; but these works have run into thousands of pages, and usually are very expensive and technically written, making them meaningless to laymen interested in the subject and giving the average lawyer an impression that it is hardly worthwhile to tackle so highly technical a statute for the very meager fees involved. Attorneys' fees have intentionally been placed under the supervision of compensation administrators, so that injured workers, who, in the main, depend on their weekly wage for subsistence, would not have to pay fees analagous to those charged in ordinary tort cases.

This situation has discouraged most lawyers from handling workmen's compensation cases. Reginald Heber Smith of Boston early realized that the Legal Aid Societies would of necessity be forced to supply the "poor man's lawyer" in this type of work, and would require the creation of workmen's compensation specialists, so that, as he has stated, "the poorest and humblest injured worker is represented by the ablest lawyer", in that field. Under the excellent supervision of Raynor M. Gardiner, The Boston Legal Aid Society has continued to provide the indigent, injured worker with such specialized legal talent. During the last few years, as compensation attorney for The Boston Legal Aid Society, I have been pleased to note the awakening interest in workmen's compensation, on the part of men eminent in legal fields.

The author of this new hornbook received his baptism and extensive experience in workmen's compensation law as compensation attorney for The Boston Legal Aid Society. His words stem from experience. He "writes from no ivory tower" *(Insurance Law Journal*, December, 1944, page 724). He must well remember when, as a Legal Aid lawyer, he was called upon to go to Washington to represent a poor widow from Utah who could afford no counsel *(Bountiful Brick Company* v. *Giles*, 276 U. S. 154; *The Reader's Digest*, November, 1942, page 87).

The book is divided into four parts, covering the historical background of compensation law and the Federal problems involved, the application of its basic theories with cases in point competently digested, the employer-employee relationship which is the foundation of compensation as compared with our legal conception of a contract of hire, and a review of important provisions common to all compensation laws. He has taken the whole system apart, divided it into its elementary parts, and put it together again like a jigsaw puzzle, indicating how each piece fits into the other to make a complete picture.

Mr. Horovitz feels that some pieces do not seem to fit quite properly; a little cutting off of some edges here and there, a few irregularities smoothed out, would seem to him to make for a better finished product. He feels that while a minority of the courts have been too narrow in some instances, the majority deserve commendation.

When one reflects that in our forty-eight states we have forty-seven compensation laws, the magnitude of the task involved in setting out in four hundred pages a clear, concise and readily understandable text becomes almost superhuman. When, in addition, the book contains a bibliography and an eighty-six

(Continued on page 163)

General John J. Pershing—Lawyer

In the corridors and open spaces of the vast institution known as the Walter Reed Hospital in Washington, young men who have been brought back from battles abroad have seen at times the soldierly and distinguished figure of General John J. Pershing, who led the first American Expeditionary Force to France in 1917 and became later the General of the Armies of the United States. In his eighty-fifth year this great military chieftain has lately made this hospital his home, in the midst of men who have seen action in World War II.

The career and pre-eminent services of this gallant soldier have been familiar to the American people for nearly half a century. Not as well known is the fact that he studied law, became a member of the Bar, was admitted to practice in the Supreme Court of the United States, was a member of the American Bar Association for eleven years, and cherished during a large part of his life a purpose some day to engage in the active practice of law. Appropriately, this sketch in connection with our cover portrait for this issue will deal mainly with those facts, rather than with details of his military service.

Pershing was born in or near LaClede, in Linn County, Missouri, on or about September 13, 1860.

His parents were of rugged stock, and rose to high esteem among their neighbors. His father, John F. Pershing, came to LaClede from Westmoreland County, Pennsylvania, to work as foreman on the railroad. He soon became a storekeeper, the postmaster, and a valued citizen. Pershing's mother, Ann Elizabeth Thompson, had been born near Nashville, Tennessee.

While a youth in high school, young Pershing formed the idea that he wanted to be a lawyer. His father, mother, and sister strongly supported this ambition.

Family circumstances led to a different course, although the idea was not abandoned. In 1882 the young man went off to the United States Military Academy at West Point, from which he was graduated with honors in 1886. He first saw fighting in the campaigns against the Apache Indians, in Arizona and New Mexico, in 1886, and in the wars with the Sioux, in the Dakotas, in 1890-91.

In 1891 the young officer was sent to the University of Nebraska as Professor of Military Science and Tactics. While serving in that capacity he studied law in the University, received the degree of Bachelor of Laws in 1893, and was admitted to the Nebraska Bar on June 29, 1893.

The fates again intervened, and Lieutenant Pershing was again sent to active duty, in the course of which he served with the 10th United States Cavalry in the Santiago campaign, in the Spanish-American War, and later made a brilliant record for leadership in the military operations against the Moros in the Philippines, where he also organized the Bureau of Insular Affairs and was its chief.

Meanwhile, his ambition to become an active practitioner of the law persisted. Before his service in Cuba, he at one time asked for transfer to a staff position in the War Department in Washington, from which he thought he could better arrange to make a start in practice. His classmate at West Point and close friend, Colonel Avery DeLano Andrews, says that Pershing at one time very seriously considered resigning from the Army, in order to practice law.

In 1896, he was admitted to the Bar of the Supreme Court of the United States, on the motion of United States Senator John M. Thurston, of Nebraska. General Pershing's certificate to the Supreme Court of the United States, dated December 11, 1896, was signed by James H. McKenney, who was then the Clerk of the Supreme Court.

After General Pershing's distinguished leadership in World War I, he retired from active duty in the Army as of September 13, 1924. As though in anticipation of that event, he was proposed for membership in the American Bar Association in June or early July of 1924. His application was obtained by R. E. L. Saner, of Texas, then President of the Association. On July 7, 1924, Fred E. Wadhams, Treasurer and Chairman of the Membership Committee, wrote to General Pershing saying: "It is a great pleasure to me to acknowledge the receipt of your application for membership in the American Bar Association which I have received from my friend, President Saner . . . . I hope it will be possible for you to be with us at at least some of our annual gatherings. You will greatly enjoy the proceedings, as well as the good fellowship which is always a distinguished feature of our meetings."

General Pershing was immediately elected and notified. He remained a member of the Association until 1935, when his resignation was accepted by the then Executive Committee as of June 30, 1935. Advancing years and his state of health advised his withdrawal from many interests and led to his residence in Tucson, Arizona. He was made a life member of the Nebraska State Bar in 1937.

It is thus an interesting chronicle that America's foremost military chieftain of World War I was a lawyer, was eager to practice law, and retained an active interest in the profession and in the American Bar Association until he was in his seventy-fifth year.

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*Uniform Procedure for State Tribunals—"The Wisconsin Administrative Procedure Act"*: For lawyers who are following current trends for uniformity in procedure before administrative tribunals, both federal and state, the article in the July issue of the *Wisconsin Law Review* (Vol. 1944 - No. 4; pages 214-239), by Ralph M. Hoyt, of the Milwaukee Bar, will be especially interesting. It presents an analysis of the Wisconsin Administrative Procedure Act enacted in 1943. Mr. Hoyt writes with considerable knowledge and experience of the subject matter, since he has been Chairman of the Committee on Administrative Agencies and Tribunals, in the Section of Judicial Administration of the American Bar Association, and also Chairman of the Committee on Administrative Tribunals in the State Bar Association of Wisconsin, as well as a member of the Special Committee on Administrative Law of the American Bar Association. Mr. Hoyt's exposition is illuminating, not only because of its detailed analysis of the provisions of the Wisconsin statute, but also because it relates the scope and purpose of that state statute to the proposals for a federal statute which have been sponsored by the American Bar Association. The article is more than a dry enumeration of statutory provisions. It expresses the informed judgment of the author on the salient problems of reform in administrative law. For instance: Referring to the provisions of the Wisconsin statute concerning rules of evidence to be observed by administrative tribunals, Mr. Hoyt says: "The new Wisconsin statute at least makes an intelligent attempt to steer a rational course between the chaos that would result from a complete lack of restraint, and the straitjacket in which the agencies would be placed by applying those exclusionary rules which were originally adopted to keep the mind of the lay juror from going astray." This discussion is recommended as one of the best and most concise statements on these important questions which have recently appeared in print. (Address: Wisconsin Law Review, Madison, Wisc.; price for a single copy: 75 cents).

ADMINISTRATIVE LAW—*"Judicial Review of Benefactory Action"*: The various types of federal activity of a benefactory nature which affect individuals, and the availability and scope of judicial review of determinations by Federal agencies in this field, are outlined and discussed in an article in the November issue of *The Georgetown Law Journal* (Vol. 33—No. 1; pages 1-32), lately received, by F. F. Blachly, member of the Staff of the Brookings Institution, and M. E. Oatman, member of the Staff of the Foreign Economic Administration. The authors point out that the Congress and the courts have adopted a variety of solutions in dealing with the problem of judicial review, depending largely upon the form of benefit granted. Judicial review is prohibited in the case of pensions and benefits to veterans and their dependents, but is expressly provided in the case of railway unemployment insurance, old age and survivors' insurance, bank deficit insurance and patents, where the benefit has a contractual aspect. The authors state their opinion to be that the Congress has in each instance based its determinations as to the form of benefit upon considerations of constitutionality, policy, and expediency, and that it would be a mistake to extend judicial review to all benefactory administrative action, as is contemplated by several bills now before the Congress, which provide for judicial scrutiny over many types of quasi-judicial determinations by administrative agencies. (Address: The Georgetown Law Journal, Washington, D. C.; price for a single copy: $1.00).

ADMINISTRATIVE LAW—*Lack of Mandatory Standards of Fair Administrative Procedure — Restrictions on Judicial Review—"A Threat to Constitutional Government"*: The leading article in the December issue of the *Virginia Law Review* (Vol. 31—No. 1; pages 1-8) is most earnestly written by Former Judge Howard W. Smith, of Virginia, the militant Chairman of the Select Committee of the House of Representatives to Investigate Executive Agencies. Judge Smith reports his finding that the so-called "administrative law" has become "the instrumentality by which far-reaching changes in our way of life are being accomplished." He traces in detail the ways in which this is brought about. He inveighs against the grounds on which judicial review of quasi-judicial determinations by the agencies has largely been taken away, in most instances by the courts but in some instances by the Con-

Editor's Note:

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover the cost plus handling and postage, a planograph or other copy of a current article.*

gress, and points out that this adds to the necessity that the agencies be kept within their constitutional and statutory bounds, be compelled to conform to fair standards of administrative procedure (as proposed by the American Bar Association's bill for the purpose), and be required to have and maintain an impartiality, independence and competence which is traditional for those exercising judicial or quasi-judicial functions. If it could be widely read by thinking people, the clarion call of this article would be, in Jefferson's phrase, "like a firebell in the night." Its circulation would be a public service. (Address: The Virginia Law Review, Charlottesville, Va.; price for a single copy: $1.25).

ANTI-TRUST ACT—*"Restraint of Trade by Combinations of Unions and Employers"*: The legal aspects of the controversial subject above quoted are brilliantly and usefully analyzed by Professor E. Merrick Dodd, of the Harvard Law School, in the December issue of the *Harvard Law Review* (Vol. LVIII—No. 2; pages 272-279). The varied judicial declarations, from the *Brims* case (272 U. S. 549), to the *Apex Hosiery* case (310 U. S. 469) and the *Hutcheson* case (312 U. S. 219), are dissected. The discussion of the *Allen Bradley Company* case (145 Fed. (2nd) 215), involving electrical contract work by the famed Local No. 3 of the IBEW in New York City, is particularly illuminating. Certiorari to the Supreme Court in that case was granted on January 2, 1945. (Address: The Harvard Law Review, Gannett House, Cambridge 38, Mass.; price for a single copy: 75 cents).

CONTRACTS—*Evidence — "The Parol Evidence Rule"*: An excellent commentary on the parol evidence rule, by Professor Arthur L. Corbin of the Yale Law School, is in the September issue of *The Yale Law Journal* (Vol. 53-No. 4; pages 603-663). After declaring that the rule does not deserve to be called in any respect a rule of evidence, and that the concept is as applicable to written evidence as to parol evidence, Professor Corbin asserts that the use of the term "parol evidence rule" has had unfortunate consequences, principally by distracting attention from the following issues: (1) "Have the parties made a contract?"; (2) "Is that contract void or voidable because of illegality, fraud, mistake, or any other reason?"; (3) "Did the parties assent to a particular writing as the complete and accurate integration of that contract?" He proceeds then, by detailed discussion and analysis of a wide variety of legal situations, to show that the rule does not and should not operate to exclude revelant evidence, whether in the nature of parol evidence or otherwise, bearing on the determination of the foregoing issues. It is not too much to say that this article should be "required reading" for all practising attorneys. (Address: The Yale Law Journal, New Haven, Conn.; price for a single copy: $1.25).

CONTRACTS—*"The Problem of Government Liability to Subcontractors under Terminated CPFF Prime Contracts—The Third Party Beneficiary Theory"*: This article by Erwin Esser Nemmers, of the Wisconsin Bar, in the December issue of the *Virginia Law Review* (Vol. 31—No. 1, pages 161-184), together with four others by the same author ("Termination of War Contracts", in the November-December issue of the *Columbia Law Review;* "Comparative Study of Termination Articles in Government War Contracts", in the January issue of the *Wisconsin Law Review;* "Principles of War Contract Termination", in the January issue of the *Journal of Business* of the University of Chicago; and "Economic Aspects of War Contract Termination", to appear in the May issue of the *Quarterly Journal of Economics*) brings an integration to the 100-billion-dollar problems which will be a key to the economy of post-war America. While in military service, the author has had a year and a half experience with termination of contracts at Headquarters of the Air Technical Service Command, Wright Field, Dayton, Ohio, and served on the staff of the Readjustment Training Course of the AAF.

The Virginia study analyzes the bearing of (1) The Government contract administrative practice; (2) the scant direct case authority; (3) the position of the *Restatement of Contracts;* and (4) the general theories of contract law in their application to the unique contractual relation established by the agreement of the Government "to assume and become liable for" the obligations of cost-plus-fixed fee prime contractors to subcontractors when the Government terminates the prime contract for its own convenience. The author contends that the Government is directly liable, on the third-party-beneficiary theory, to all subcontractors under a CPFF prime contract (regardless of how remote they are), and that the Government cannot rid itself of this liability (once assumed) by any subsequent agreement with the CPFF prime contractor. He traces the rather accidental carry-over of the CPFF clause from World War I Contracts and the recent effort of the Government to eliminate by a new clause the liability which it undertook to subcontractors, rather unwittingly, he suggested. Mr. Nemmers brings out clearly by illustrations the need that members of the Bar who expect to handle termination litigation shall become thoroughly familiar with (1) the accidental facts of Government contract execution and (2) the rights which were conferred by The Contract Settlement Act of 1944 but are not always fully implemented by the Joint Termination Regulation of November, 1944. He points out the dangers to the prime contractor (and to "upper tier" subcontractors) who may, as by-standers, be squeezed by the war between the Government and the "recalcitrant" subcontractors in lower tiers. The "jockeying about" which may take place in termination settlements is hinted at, for the "assumption of liability" clause in Govern-

ment war contracts may be a linchpin which could be pulled by unscrupulous contractors to rid themselves of competitors. (Address: Virginia Law Review, Charlottesville, Va.; price for a single copy: $1.25).

CONTRACTS–*"The Effect of War on Pre-existing Contracts Involving Enemy Nationals":* A comprehensive discussion and documentation of the above-quoted subject is in the September issue of *The Yale Law Journal* (Vol. 53, No. 4; pages 700-720), by Sidney A. Diamond, who is a Special Assistant to the Attorney General of the United States but who states that the article represents his own views and not those of the Department. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.00).

COURTS–*Jurisdiction – "Recent Supreme Court Limitations on Federal Jurisdiction":* More than a few lawyers are frequently baffled to determine, with reasonable certainty in their clients' interests, the extent to which the Supreme Court has lately diminished the jurisdiction of Federal Courts, without action by the Congress. A critical and perhaps helpful analysis of the recent decisions on this subject is in a "note" in the September issue of *The Yale Law Journal* (Vol. 53, No. 4; pages 788-795). "It is difficult to find any logically consistent reconciliation of the results in the *Burford, Magnolia and Meredith* case", is the conclusion. (Address: The Yale Law Journal, 127 Wall Street, New Haven, Conn.; price for a single copy: $1.25).

DOMESTIC RELATIONS – *Divorce–Custody and Maintenance of Children:* The custody of children often is the most challenging phase of a divorce proceeding. Its problems call for careful and objective professional attention by the lawyers in the case, as well as by the court. The editors of *Law and Contemporary Problems* (School of Law, Duke University) have made a valuable contribution to a better understanding of the questions by devoting an issue to a symposium entitled "Children of Divorced Parents" (Vol. X–No. 5; pages 697-866). The symposium contains a series of studies in which the points of view of the judge and the lawyer are set forth, along with those of the sociologist and psychiatrist.

An article by Judge Carl A. Weiman of the Court of Common Pleas, Jefferson County, Ohio, under the title "The Trial Judge Awards Custody", and one by Judge L. N. Turrentine of the California Superior Court (who is also a Judge of the Juvenile Court), on maintenance decrees, are noteworthy. Appellate problems in cases involving custody and maintenance are discussed in two articles written, respectively, by John W. Bronson of the Ohio Bar and Lee Whitmire, Jr., of the Pennsylvania Bar. The application of rules of conflict of laws to custody and maintenance issues is summarized in a well-annotated article by Dean Dale F. Stansbury of School of Law at Wake Forest College. The special problems concerning the care and maintenance of divorced servicemen's children in this time of war are explained in an extended article by Major-General Jay L. Benedict, who is President of the War Department's Dependency Board.

Lawyers will be interested also in other articles of the symposium which are written from the points of view of social sciences other than law. Of these, the "Observations by a 'Friend of the Court' ", by Edward Pokorny of the Michigan Bar, who has been "a friend of the Court" for the Circuit Court of Wayne County, Michigan, is directly related to the problems as they confront the profession of law. It reviews the author's experience over a number of years in gathering data for the assistance of the Court in considering and modifying custody and maintenance orders. (Address: Law and Contemporary Problems, Duke Station, Durham, N. C.; price for a single copy: $1.00).

EVIDENCE–*"The Doctrine of Res Ipsa Loquitur in Aviation Law":* The second and concluding installment of the above-entitled study by Howard S. Goldin is in the December issue of the *Southern California Law Review* (Vol. XVIII–No. 2; pages 124-153). The first installment was in the September issue (see 31 A.B.A.J. 46). In the second installment, the author discusses the application of the doctrine of *res ipsa loquitur* in cases involving injury to persons and property on the ground and damage by aircraft to persons and property transported. An extensive review of the authorities is made; and it is concluded that "all the vagaries and uncertainties which surround the application of the doctrine to land accidents" have been carried over into the realm of aviation law. (Address: Southern California Law Review, 3660 University Avenue, Los Angeles 7, Cal.; price for a single copy: $1.00).

LAWYERS–*"A Bookkeeping System for a Small Law Office":* In the January issue of the *Canadian Bar Review* (Vol. XXIII–No. 1; pages 35-42), E. B. Fairbanks of the Montreal Bar writes a practical and very detailed article on the subject above quoted. The system outlined is evidently that used in the author's own office. The set-up includes a system for keeping personal accounts, contemporaneously but independently, for tax and other purposes. The system may well be compared with that suggested by Reginald Heber Smith, of the Boston Bar, in the revised edition of his "Law Office Organization", advertised currently in the JOURNAL. For anyone struggling with an accounting system for a small law office, Mr. Fairbanks' article will be helpful. (Address: Canadian Bar Review, Ottawa Electric Building,

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AMERICAN BAR ASSOCIATION
Journal

The Crimea Conference

On the anniversary of the birth of Abraham Lincoln, another step forward was taken toward organized cooperation and a continuing accord by the Nations now engaged in the struggle against the tyrannies imposed by the overlords of Germany and Japan.

That such a Conference could have been convened at the very crisis of the war, and could have been attended by the heads of the three principal Nations opposing the Axis, reflected confidence in the progress toward victory.

That the Conference was held on Russian soil in what was once a summer palace of the Czar, and that the President of the United States and the Prime Minister of Great Britain could meet with the Soviet leader in such a setting and could encompass such large areas of agreement, show how distances have dwindled and unity of effort has been achieved.

High among the concrete results was the recognition by the heads of the three governments, that the rights of self-government under orderly conditions should be restored to the people who have suffered so grievously under Nazi rule.

It was agreed that even during the continuance of war and subject to its necessities, the liberated peoples might establish temporary governments, in which various classes should be broadly represented, and that at the earliest time warranted by the limitations of a state of war or by the conditions which follow the ending of strife in particular areas, there should be free popular elections, open to all, for the choice of officers of their respective governments.

This Conference did not stop with abstract generalizations; it was epic-making in that the representatives of the United States participated actively in finding fair solutions for urgent European problems which could not be deferred for the consideration of post-war tribunals and commissions.

There is, and there will be, a contrariety of views as to the details of what has thus far been agreed on in relation to Poland and other areas, including Germany. The whole picture and the final operation of the formulae may not at once fully appear. The important thing is that amicable procedures were arrived at in the light of reason and fair play, and that none of the chieftains present insisted on having everything his own way.

For the accomplishment of those objectives and as indispensable prerequisites of freedom to all nations, large and small alike, plans for speeding the defeat of the aggressor nations were discussed and complete accord as to the prosecution of the war against Nazi Germany was definitely reached.

Highly significant is the fact that in the City of the Golden Gate, looking out across the Pacific, there will be a meeting of the United Nations for the formulation of an agreement by all the free peoples to forbid the resort to war for the settlement of disputes between Nations, and to provide for their settlement by a Permanent Court of International Justice.

Most encouraging is the fact that the substitution of agreements for treaties seems to be one part of the plan and we hear little about a super-government. The Charter of the United Nations contemplates treaties, which are to be approved according to the constitutions of the respective Nations. That may be one of the reasons that the leaders of both our political parties are in almost unanimous accord as to the hopeful portent for the future.

Lawyers, from their study of the law of government, and from their constant participation in the solution of practical problems in that field, have a special competence and a consequent responsibility for aiding in the important field which was preliminarily surveyed at Dumbarton Oaks, and which is to be re-examined and expanded next month at San Francisco.

But the responsibility is not solely that of bar associations, committees or civil groups. Public opinion must be informed, crystalized, mobilized and made vocal in every part of America, to the end that this great effort for peace and law shall not fail or fall short.

For all this the responsibility of each individual lawyer in his home community is immediate and very great. Probably as never before in American history this is a time when each lawyer and each citizen should, for himself, take the old "patriot's oath," which was put to paper by Edward Everett Hale:

"I am only one,
But I am one;
I cannot do everything,
But I can do something,
And what I can do,
That I ought to do;
And what I ought to do,
By the grace of God,
I will do."

International Order and International Law

A distinguished review of an important book is contributed to this issue by Judge Manley O. Hudson, of the Permanent Court of International Justice, who writes concerning Professor J. L. Brierly's *The Outlook for International Law*.

Both the book and the review challenge the assumptions that acts of aggression and war can be prevented by international "police action" and that war can be forestalled merely or mostly by the functioning of international law and tribunals. The restoration of law among the nations "is no guarantee of peace alone," although Professor Brierly assigns it a large influence in removing incipient causes of conflict.

The author and the reviewer alike make the points that order and security are not created by law; that order must exist "before law can even begin to take root and grow"; that "security for all can only be collective security"; and that it is "an expensive way of providing collective security to have to improvise the system after war has begun."

Professor Brierly maintains his theses that "more than half of the value of a security system lies in its having a deterrent effect," and that adequate organization of the Nations is "a pre-requisite for the advance of international law." His favorable view of the progress made in international judicial organization will be heartening to those who, in the United States and Canada, are striving to maintain and extend that progress. The lawyers of America are making clear their desire that existing international law shall be broadened, strengthened, and given an increasing authority, and that the obligatory submission of disputes to the World Court shall also be broadened in scope.

A reading of Judge Hudson's realistic review is likely to lead many lawyers to obtain and study also the book, which is the newest, and is acclaimed as one of the best, in its field.

The Rules of Criminal Procedure

The time has come to speak frankly but with due regard for all reasonable differences in opinion, we think, as to what has recently taken place regarding the new Rules of Criminal Procedure for the District Courts of the United States. These Rules are a project to which the American Bar Association, through its House of Delegates, has been committed.

The action of the Supreme Court in prescribing Rules of Criminal Procedure for the District Courts is, of course, a reason for deep gratification to the Association and to all who have labored in that cause. For a great many years the Association led the long struggle to vest rule-making power in the courts, and particularly in the Supreme Court, in respect of federal procedure. As long ago as 1913 the Association adopted a Resolution which advocated the enactment of legislation by the Congress to confirm or confer such authority in the Supreme Court, in respect of civil procedure.

Successful culmination of this campaign was attained in 1938, when the Federal Rules of Civil Procedure became effective. They revolutionized federal civil practice, and introduced what constitutes probably the simplest and least technical type of civil procedure yet devised in Anglo-American jurisprudence. This Association staunchly supported the enactment of a similar measure as to procedure in criminal cases. The result was the Act of 1940, pursuant to which the Supreme Court has now prescribed the Rules of Criminal Procedure.

Logically, the courts should be clothed with the power to regulate their own procedures. Practical experience has shown that judicial rule-making results generally in a procedure which is superior to that produced by legislative action. The development and spread of rule-making by the courts is one of the notable advances of our times, in the field of law reform. The Supreme Court, in prescribing the authorized Rules, has made noteworthy contributions, which stand as examples to the states.

Although differences of opinion are to be expected in any remedial undertaking, it is regrettable that Mr. Justice Frankfurter, who has favored many improvements and reforms in the law and procedure, expressed himself in this instance as opposed to the views of a majority of his colleagues, and indicated a belief that the Supreme Court is not an appropriate agency for formulating Rules of Criminal Precedure for the District Courts.

With all deference, the suggestion may be ventured that such an objection is not timely. In 1940 the Congress, without a dissenting voice, passed the statute which confirmed or conferred this authority in the Court. The President of the United States had expressed himself as favoring the legislation. In February of 1941, the Supreme Court made an Order which stated that it would undertake the preparation of the Rules and which appointed an Advisory Committee to assist the Court in this project. No dissent was then indicated, and the Order appears to have been made unanimously.

The Advisory Committee labored for three years. It enlisted the cooperation of local Bar committees appointed by Circuit and District Judges, as well as of committees appointed by bar associations. An Institute for the discussion of drafts of the Rules was conducted by this Association at its 1943 meeting. Other bar associations devoted considerable time and energy to cooperating in this undertaking. Any suggestion that all of this work should be jettisoned on the ground that the Supreme Court is not an appropriate tribunal for formulating Rules of Criminal Procedure for the District Courts seems to be at least belated.

Friends of progress in judicial rule-making are rejoiced that other members of the Supreme Court were not persuaded by the reluctance of one of their colleagues. It seems difficult to contemplate that a tribunal

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Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Sherman Anti-Trust Act—Clayton Act —Patent Law—Limits of Lawful Patent Monopoly

Control of industry by agreements between owners of large groups of patents, pursuant to a conspiracy to create a monopoly in glass-making machines, violates Sherman Act, where control is exercised to eliminate competition in manufacture and sale of machinery, to allot production of unpatented glassware between licensed manufacturers, and to maintain prices of unpatented articles. Decree in injunction suit should not impose penalties in guise of preventing further violations. Clayton Act violated by license agreement under which licensee may sell licensed machines only to those holding licenses from the licensor to use them, where licensor discriminates between applicants for licenses.

Hartford-Empire Co. et al. v. *United States*, 89 L. ed. Adv. Ops. 302; 65 Sup. Ct. Rep. 373; U. S. Law Week 4122. (Nos. 2-11, argued (orig.) November 16, 1943, reargued October 9 and 10, 1944, decided January 8, 1945).

These actions were brought against twelve corporations and one hundred and one of their officers and directors, engaged in automatic glass-making machinery and in the glass-ware industry. The charge was that the defendants combined and conspired to monopolize and did monopolize and restrain interstate and foreign commerce by acquiring patents covering the manufacture of glass-making machinery and by excluding others from that industry and have limited and restricted the use of the patented machinery by a network of agreements.

The trial lasted 112 days. The suit was dismissed as to three corporations and forty individuals.

The decree granted the relief prayed by the Government. It is too long to state in detail here. The principal questions are in regard to the restrictions imposed on the defendants in order to put an end to the monopoly and prevent action which might lead to its renewal.

From the decree the defendants appealed to the Supreme Court. That Court affirmed the District Court's findings and conclusions that the corporate defendants combined in violation of the Sherman Act, that certain of them contracted in violation of the Clayton Act but ordered the suit dismissed as to certain defendants and modified the decree as to the preventive measures prescribed for the termination of the monopolistic action.

Mr. Justice ROBERTS delivered the opinion of the Court. After his review of the facts he says:

> . . . *The gravamen of the case is that the defendants have cooperated in obtaining and licensing patents covering glass-making machinery, have limited and restricted the use of the patented machinery by a network of agreements, and have maintained prices for unpatented glassware.*

After a painstaking review of the facts shown by the record and incorporated in the decree and the justification offered by the defendants, Mr. Justice ROBERTS says:

> *We affirm the District Court's findings and conclusions that the corporate appellants combined in violation of the Sherman Act, that Hartford and Lynch contracted in violation of the Clayton Act, and that the individual appellants with exceptions to be noted participated in the violations in their capacities as officers and directors of the corporations.*

The objections of certain defendants that the allegations of the bill were insufficient to support a decree against them and the findings not supported by the evidence, were examined and sustained and the decree reversed as to them.

Coming to the larger questions involved, Mr. Justice ROBERTS quotes from the *Standard Sanitary Company* case as follows:

> *"Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."*

and in the application of the basic principle this opinion says:

> *The difference between legitimate use and prohibited abuse of the restrictions incident to the ownership of patents by the pooling of them is discussed in* Standard Oil Co. v. United States, *283 U. S. 163. Application of the tests there announced sustains the District Court's decision. It is clear that, by cooperative arrangements and binding agreements, the appellant corporations, over a period of years, regulated and suppressed competition in the use of glass-making machinery and employed their joint patent position to allocate fields of manufacture and to maintain prices of unpatented glassware.*

The explanations offered by the appellants are unconvincing.

This conclusion is supported by the statement that—

> *The explanation fails to account for*

*Assisted by JAMES L. HOMIRE; Tax cases by Committee on Publications of the Section of Taxation, Mark H. Johnson, chairman; *Hartford-Empire Co. et al.* v. *U. S.*, by Irvin H. Fathchild.

the offensive and defensive alliance of patent owners with its concomitant stifling of initiative, invention, and competition.

The District Court determined that the partial correction of the situation was not crucial in determining the propriety of issuing an injunction, that in any event the situation was still in substantial violation of these statutes and in seeking to assure complete elimination of the determined illegality cut rather deeply and broadly into this complex commercial structure.

As to many of the preventive provisions of the decree, Mr. Justice ROBERTS characterized them as "legislative rather than remedial;" and quoted from *Chapman* v. *Wintroath* the following paragraph:

"A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. . . . No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public."

As a basis for the many specific modifications of the decree, Mr. Justice ROBERTS says:

That a patent is property, protected against appropriation both by individuals and by government, has long been settled. In recognition of this quality of a patent the courts, in enjoining violations of the Sherman Act arising from the use of patent licenses, agreements, and leases have abstained from action which amounted to a forfeiture of the patents.

In the light of these principles the objections to the decree are examined paragraph by paragraph, approved in part and in other parts modified.

Mr. Justice DOUGLAS, Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or decision of the case.

Mr. Justice RUTLEDGE, with whom Mr. Justice BLACK joined, delivered an opinion concurring in the Court's judgment to the extent that it sustained the District Court's findings and decree but dissenting with two exceptions from modifications made in the decree.

Mr. Justice BLACK also delivered a separate dissenting opinion in which he says:

I agree with the Court's judgment insofar as it sustains the decree of the district judge.

* * *

I would sustain the decree of the District Court, for the reasons it gave, in all of the paragraphs mentioned.

The case was argued by Mr. John T. Cahill for Hartford-Empire Company in No. 2, by Mr. Robert T. Swaine for Owens-Illinois Glass Company in No. 4, by Mr. Boykin C. Wright for Corning Glass Works in No. 3, by Mr. Stephen H. Philbin for Hazel-Atlas Glass Company in No. 5, by Mr. Lehr Fees for Lynch Corporation in No. 7, by Mr. E. W. McCallister for Ball Brothers Company in No. 8, by Mr. Luther Day for Glass Containers Association of America, Inc., in No. 9, and by Mr. Fred Fuller for Isaac J. Collins and T. C. Fulton in Nos. 10 and 11, and by Mr. Assistant Attorney General Cox and Mr. Samuel S. Isseks for the Government. Case submitted by Mr. Ralph Emery for Thatcher Manufacturing Company in No. 6.

National Labor Relations Act—Power of National Labor Relations Board to Shape its Remedies—Scope of Order—Federal Rules of Civil Procedure—Rule 65(d).

In issuing a cease and desist order under the Act, the Board may include the "successors and assigns" of the employer as well as the employer itself within the operation of the order.

Regal Knitwear Company v. *National Labor Relations Board*, 89 L. ed. Adv. Ops. 437; 65 Sup. Ct. Rep. 478; U. S. Law Week 4151. (No. 86, argued December 8, decided January 29, 1945).

The Board, after proceedings, issued a cease and desist order against the employer and obtained an enforcement order from the Circuit Court of Appeals. Certiorari was granted to determine the question on which the Circuit Courts are in conflict, namely, whether the Board, when it orders a particular employer to cease and desist, may properly also order "its officers, agents, successors and assigns" to cease and desist. The precise question is whether the enforcement order shall be modified by deleting the words "successors and assigns" so as to exclude them from the injunction. There has been considerable contrariety of opinion amongst the various Circuits as to the scope and effect of a cease and desist order whether it includes or excludes the words under consideration here.

On certiorari, the Supreme Court, in an opinion by Mr. Justice JACKSON, affirmed the ruling of the Circuit Court, which had sustained the Board. Commenting on the differing views of the lower courts and the historic origin of the term in the practice of conveyancers, Mr. Justice JACKSON says:

When one court of appeals strikes out the provision but says its absence may in some circumstances have the same effect as if it were there, and another court of appeals approves the provision but says its presence may have no more effect than if it were out, there is more than a faint suggestion that the conflict is over semantics rather than over practical realities.

The formula that includes successors and assigns, among others, is one probably borrowed from the jargon of conveyancing. Doubtless these words often are used, not out of consideration of their appropriateness, but because of their familiarity.

The opinion also notes the very considerable latitude which administrative agencies have in shaping their remedies. Their orders, however, may not be enforced by courts by an injunction so broad as to make punishable the conduct of persons who act independently and whose

rights have not been judicially determined.

However, Rule 65 (d) of the Federal Rules of Civil Procedure is cited as the true measure of the scope of the enforcement order. In this connection, the opinion states:

> *The Federal Rules of Civil Procedure provide that: "Every order granting an injunction and every restraining order . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." This is derived from the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.*
>
> * * *
>
> *We do not undertake to decide whether or under what circumstances any kind of successor or assign will be liable for violation of a Labor Board order. It is true that we have said that "Questions of construction had better be ironed out before enforcement orders issue than upon contempt proceedings." . . . But it is apparent from Rule 65, and from the views of one circuit court of appeals as to the narrow effect of the words in the order and of another as to broad effect of the order without the words, that whether one brings himself in contempt as a "successor or assign" depends on an appraisal of his relations and behavior and not upon mere construction of terms of the order.*

Since no concrete case was before the Court, it was found unnecessary to determine what parties would be within the operation of the words "successors and assigns", as used here.

The CHIEF JUSTICE delivered a dissenting opinion, in which Mr. Justice ROBERTS and Mr. Justice REED concurred. Describing an injunction as a continuing threat to those named as subject to it, the dissenting opinion continues:

> *It has long been deemed to be an abuse of power for a federal court to enjoin practices in which a defendant has not engaged and which are unrelated to those which may be properly enjoined. . . . To me it seems no less a misuse of authority for a court, as well as for the Labor Board itself, to threaten those who are not subject to its command. This is the more so where the tendency of the threat is to inflict an unauthorized penalty on the employer by deterring third persons from dealing with him to acquire his property and business, in circumstances in which that may lawfully be done.*
>
> *That there have been numerous cases before this Court where the Board's order has not been challenged in this respect, is significant only as showing how extensive the abuse has become and how ready employers and the lower courts have been to acquiesce in threatened wrong when the injury seemed not to be immediate. But these are not reasons for our acquiescence, when the question is brought to us for decision for the first time. It is no part of the function of the Board or of courts to make unwarranted threats against suitors or innocent third persons. Such misleading and unwarranted use of the phrase should be avoided, either by striking it from the decree or so qualifying it as to designate the class of "successors and assigns" to whom it may be lawfully applied.*

The case was argued by Mr. Malcolm F. Halliday for Regal and submitted by Mr. John P. Chandler for the Government.

Taxation—Gift Tax—Gift of Future Interest in Property.

Gifts in trust to accumulate income during minority are gifts of future interests to which exclusions are not applicable, although trustee had power to invade income and corpus for support, maintenance and education of beneficiaries if necessary.

Ella F. Fondren, and Estate of W. W. Fondren, Deceased, et al. v. *Commissioner,* 89 L. Ed. Adv. Ops. 449; 65 Sup. Ct. Rep. 499; U. S. Law Week 4149. (No. 88, argued December 11 and 12, 1944, decided January 29, 1945).

Ella F. Fondren and her husband created irrevocable trusts for their minor grandchildren with the husband as trustee and the other donor as successor trustee. The trusts were stated to be for the comfort, support, maintenance and welfare of the grandchildren and were to continue until each child reached age 35, although part of the corpus and income accumulations were payable at age 25, another part at age 30 and the remainder at 35. While the trust agreements authorized the trustee to use corpus in addition to income if necessary for the support, maintenance and education of each grandchild, they further recited that it was contemplated that the grandchildren would have other adequate means of support and it would not be necessary to use either income or corpus. If the income was not needed, it was to be added to corpus.

In 1937 the donors made gifts in excess of $5,000 to each trust and claimed exclusions of $5,000 with respect to the gifts on their gift tax returns. The Commissioner disallowed the exclusions on the ground that the gifts were of "future interests in property." The Tax Court upheld the Commissioner and the Circuit Court of Appeals affirmed. Certiorari was granted because of the importance of the question as affecting the taxability of gifts for the benefit of minor children and alleged conflict with decisions of other courts.

The Supreme Court, in an opinion delivered by Mr. Justice RUTLEDGE, affirms the judgment below upholding the disallowance of the exclusions. Mr. Justice RUTLEDGE points out that the issue is whether the interests acquired by the minor beneficiaries were limited to commence in use, possession, or enjoy-

ment at a future date or time, and that under previous decisions of the Court in *Ryerson* v. *United States,* 312 U. S. 405, and *United States* v. *Pelzer,* 312 U. S. 399, it is not enough to bring the exclusion into force that the donee has vested rights. He must have a present right to use, possess or enjoy the property.

After referring to various decisions which have established that a gift of a future interest is made where distribution of corpus is deferred to a future date or where income is to be accumulated and paid over at a later time, even though some or all may be paid on the happening of an earlier contingency, Mr. Justice RUTLEDGE proceeds to examine the terms of the present trusts and the circumstances of the gifts. He determines that the trustee was without power to apply income or corpus for the support, maintenance and education of the beneficiary until necessity arises; while present enjoyment by the beneficiary was not dependent upon an exercise of absolute discretion on the part of the trustee, nevertheless it was dependent upon another contingency, namely, the existence of need. Since enjoyment of the gift was contingent upon future events which were uncertain and probably would not occur, the gifts were of "future interests in property."

The petitioners argued that the barring of exclusions by the statute in the case of gifts of future interests was intended by Congress to meet the administrative difficulties of determining the number of donees and the values of their gifts and that here, since the donees were all in being and the amounts of the gifts were definite, these difficulties were not present and the exclusions should be allowed. Mr. Justice RUTLEDGE finds the present case to be not different from that in the *Pelzer* case, *supra,* except that here the period of postponement which the beneficiary must survive before his enjoyment of the gift begins is indefinite rather than for a specified time of 10 years as in the *Pelzer* case. Mr. Justice RUTLEDGE states that the important thing is the certainty of postponement; if there is postponement, the exemption is denied whether or not the difficulties of determining the donees and the values of the gifts are present.

It was also argued by the petitioners that where gifts are made for the benefit of minor children who cannot manage their own property, provision must be made for its control by trustees or otherwise; since the trustees could not withhold income or corpus in case of need, the fund was available to the beneficiaries immediately and they had as full a right of present enjoyment as any minor children could have. In dismissing this argument Mr. Justice RUTLEDGE points to the facts that the contingency of need nevertheless stood in the way of any child's receiving anything from the trust, that the trusts themselves recited an absence of any such need at the time of the gifts, and the further fact that the trusts did not terminate with the period of minority.

The final argument that unless the gifts were treated as giving a right to immediate enjoyment, no gift for the benefit of a minor can be so treated since some competent person must always be the judge as to the requirements of the beneficiary, is dismissed by Mr. Justice RUTLEDGE on the ground that under the terms of the trusts and the facts recited in the instruments in this case none of the fund could be immediately applied for the child's use and enjoyment. The exemption will apply in other cases, Mr. Justice RUTLEDGE states, whenever provision is made for immediate application of the fund for the minor's benefit.

The case was argued by Mr. W. M. Cleaves for Ella F. Fondren and by Mr. J. Louis Monarch for Commissioner of Internal Revenue.

Taxation—Oil and Gas Property—Sale of Equipment.

Equipment may be separately "sold" by the owner of an oil and gas lease, even though such sale is part of a sublease in which the seller reserves a royalty interest in the oil and gas to be produced.

Choate v. *Commissioner of Internal Revenue,* 89 L. ed. Adv. Ops. 417; 65 Sup. Ct. Rep. 469; U. S. Law Week 4154. (No. 93, argued January 2, decided January 29, 1945).

In 1938, Choate and Hogan, a partnership of which petitioner was a member, sold all their right, title and interest in an oil and gas lease together with all wells and the equipment thereof, including pumps, casing, piping, tanks, lease house, etc. for a cash consideration of $110,000. They expressly reserved to themselves "⅛th of the 8/8ths of all oil and gas and casinghead gas which may be produced and saved" from the land. Choate and Hogan, in their partnership return for 1938, reported the transaction as a sale. The respondent in his deficiency notice ruled that the transaction constituted a sublease.

The Tax Court sustained respondent's view and held that recovery by depletion was applicable where a royalty interest was retained and that a cash bonus was to be regarded as an advanced royalty. It held, however, that there had been an absolute sale of the equipment; that its cost was not recoverable by depletion and that the partners were entitled to an allowance for the unrecovered cost of the equipment.

The Commissioner challenged the latter ruling in the Circuit Court of Appeals, Fifth Circuit, as to Hogan and in the Tenth Circuit as to Choate. He was sustained in the Tenth Circuit but lost in the Fifth Circuit. To resolve the conflict, the Supreme Court granted certiorari to the Tenth Circuit and reversed the judgment.

The unanimous opinion of the Court was delivered by Mr. Justice DOUGLAS. The opinion says:

> *. . . Depletion is applicable to wasting assets—to the exhaustion of natural resources, not of property used in a business. . . . And the history of the depletion provisions indeed makes clear that only intangible drilling and development costs, not costs represented by physical property, are returnable by way of depletion. . . . In the second place, the Tax Court found that the parties intended a cash sale of*

the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for the Tax Court under Dobson v. Commissioner. . . ." *Once a sale of the equipment is conceded, it is not denied that petitioner is entitled to an allowance for the unrecovered cost of the equipment transferred.*

The case was argued by Mr. James H. Yeatman for Choate and by Mr. Joseph S. Platt for Commissioner of Internal Revenue.

Taxation—Limitations upon Refund Claim—Deposit Prior to Assessment.

A payment made before the filing of a return is a mere deposit; where part of that deposit is applied in satisfaction of an erroneous additional assessment, the period for filing claim for refund of that amount begins only at the time it is so applied.

Rosenman v. *United States*, 89 L. ed. Adv. Ops. 421; 65 Sup. Ct. Rep. 536; U. S. Law Week 4157 (No. 207, argued December 15, 1944, decided January 29, 1945).

This is an action for the refund of estate tax, which the government resisted on the ground that the claim for refund was not filed within three years after the payment of the tax. The decedent died on December 25, 1933. Under appropriate statutory authority, the Commissioner of Internal Revenue extended the time for filing the estate tax return to February 25, 1935. But there was no extension of the time for payment of the tax which became due one year after the decedent's death, on December 25, 1934. The day before the executors delivered to the Collector of Internal Revenue a check for $120,000, the purpose of which was thus defined in a letter of transmittal: "We are delivering to you herewith, by messenger, an Estate check payable to your order, for $120,000, as a payment on account of the Federal Estate tax. . . . This payment is made under protest and duress, and solely for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due." This amount was placed by the Collector in a suspense account to the credit of the estate. On February 25, 1935, an estate tax return was filed, showing a lesser tax than that originally paid. On March 28, 1935, the Collector advised the executors that part of the amount held in the suspense account had been applied in satisfaction of the amount of tax assessed under their return. On March 26, 1938, a claim for refund of the balance was filed. The Commissioner thereafter assessed a deficiency of an amount in excess of that balance, and applied that balance in partial satisfaction of the assessment. Within three years after that application, the executors filed a claim for refund of the amount so applied. Upon rejection of the claim, the executors brought suit in the Court of Claims, which denied recovery (53 F. Supp. 722).

Upon certiorari, the judgment was reversed in an opinion by Mr. Justice FRANKFURTER. The opinion states that the amount in excess of the tax shown on the return was not "paid" until it was applied in satisfaction of the deficiency assessment. Since the claim for refund was filed within three years after that date, the claim was timely.

In substantiation of this result, the Court noted and approved the rule that payments made in advance of assessment are merely "deposits," which do not draw interest as "overpayments" when refund is made.

The case was argued by Mr. Charles Angulo for Rosenman and by Mr. Chester T. Lane for United States.

Manufacturers' Excise Tax—Selling and Advertising Expenses Includable in Computation

Selling and advertising expenses borne by the manufacturer may not be deducted in computing the selling price on which the manufacturer's excise tax is levied.

F. W. Fitch Co. v. *United States*, 89 L. ed. Adv. Ops. 407; 65 Sup. Ct. Rep. 409; U. S. Law Week 4139. (No. 181, argued December 13, 1944, decided January 15, 1945).

In this case the unanimous Court in an opinion by Mr. Justice MURPHY resolves a conflict between the Seventh and Eighth Circuit Courts of Appeals, the former having held in *Campana Corp.* v. *Harrison*, 114 Fed. (2d) 400, and *Campana Corp.* v. *Harrison*, 135 Fed. (2d) 334, that manufacturers' selling and advertising expenses should be excluded from the selling price in computing the tax imposed by Section 603 of the Revenue Act of 1932, Internal Revenue Code, Section 3401. The petitioner, a manufacturer of toilet preparations, contended that advertising and selling costs should be excluded under Section 619(a) of the statute, reading in part as follows:

> *A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price . . .*

The Court reviews the statutory history and concludes that the phrase "other charges" must be deemed to refer only to charges incurred after the actual shipment of the article and that all charges incurred prior thereto must be included in the selling price. The court concedes that this conclusion results in discrimination against a manufacturer who indulges in his own advertising in favor of one whose products are advertised by his customers, but states that this discrimination is an unavoidable consequence of an excise tax based on the wholesale selling price.

Mr. Justice ROBERTS concurred without opinion. The case was argued by Mr. Arnold F. Schaetzle for Fitch Co. and by Mr. Andrew D. Sharpe for the United States.

Bankruptcy—Plan of Reorganization Under Section 77B—Rights Left Under Confirmation Order for Determination by Court of Competent Jurisdiction.

In reorganization proceedings under Section 77B, the order of the bankruptcy court confirming a plan of reorganization left for determination, by a court of competent jurisdiction, the asserted parity of mortgage participation certificates guaranteed by the debtor, which the debtor purchased after default, as against other

guaranteed certificates not purchased by the debtor. It is held that the state governs the determination of that issue.

Prudence Realization Corporation v. *Ferris, et al.*, 89 L. ed. Adv. Ops. 456; 65 Sup. Ct. Rep. 539; U. S. Law Week 4155. (No. 137, argued December 8 and 11, decided January 29, 1945).

Prudence Company, Inc., predecessor of the petitioner, Prudence Realization Corporation, guaranteed mortgage participation certificates issued by it in a bond and mortgage made by Burnside Improvement Company. Burnside defaulted and Prudence, after the default, bought some 42% of the mortgage participation certificates. The mortgaged premises were later conveyed to Amalgamated Properties, Inc., a wholly-owned subsidiary of Prudence. In 1935, Prudence went into proceedings for reorganization under Section 77B of the Bankruptcy Act and was adjudicated insolvent in 1938. Amalgamated was put into the same proceedings but the two were later severed. A reorganization plan was approved under which all assets of Prudence (including the Burnside certificates) were transferred to Prudence Realization Corporation. In the Amalgamated proceedings Prudence claimed parity participation with other Burnside certificate holders. The case was closed after a decree which left the claim of parity for determination by a "Court of competent jurisdiction". Pending that determination, the shares claimed by Prudence Realization were held in escrow. An action was brought in New York for a determination of the question and the New York Court of Appeals ruled that the guarantor's certificates should be subordinated to those of other holders.

On certiorari the Supreme Court affirmed in an opinion by Mr. Justice FRANKFURTER. The opinion discusses a ruling on another phase of the Prudence operations which was considered in *Prudence Corporation* v. *Geist*, 316 U. S. 89. That case is distinguished from the present case on the ground that, in the former, jurisdiction was retained in the bankruptcy court to determine the question of subordination there raised, with the consequence that the Court there was under duty to apply federal and not state law, and that there was consequently no agreement or equitable basis for depriving Prudence Company and its creditors of the benefits of the usual bankruptcy rule of equality.

However, in the present case, the question being left by the terms of the decree for determination by a court of competent jurisdiction, it is concluded that the state law governs. The following sets forth the basis of the Court's ruling:

> *But it is urged that although the bankruptcy court specifically refused to consider the rights of the parties and remitted them, plainly enough, to the state courts for their determination, the rights were to be determined in the state courts by federal law because the parties had passed through federal reorganization proceedings. In spite of an order of final termination, the authority of the bankruptcy court somehow continues to be effective. Despite the fact that neither the bankruptcy court nor the reorganization statute professes to alter rights unless disclosed in the plan or in an order, we are asked to recognize some enveloping cloud of amenability to the law governing bankruptcy proceedings.*
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> *When they came before a New York court seeking a determination of their present rights, that court was obliged to ascertain whether any rights had been fixed by the reorganization plan and, if so, to enforce them. Rights not affected by the federal proceedings the New York court was free to decide according to New York law.*
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> *And since, in the circumstances of this case, New York law governs, we are not called upon to indicate, it hardly needs to be added, whether the result would be different were the federal rule for distribution to creditors applicable.*

The CHIEF JUSTICE concurred in the result and set forth his views in a separate opinion. His position was that since the issue raised was in a bankruptcy proceeding, it is governed by federal law and that the mere fact that it is to be determined by a state court does not make it any less the duty of that court to apply the federal law. He took the view that the judgment should be affirmed, not because the plan of reorganization called for determination of Prudence Realization's rights by state rather than federal law, but because, in the circumstances, the applicable federal law is the same as that which the state law has applied.

Mr. Justice RUTLEDGE concurred in the opinion of the CHIEF JUSTICE.

The case was argued by Mr. Charles H. Kriger and Mr. Eugene Blanc, Jr. for Prudence and by Mr. Irving L. Schanzer for Ferris, et al.

Criminal Law—Due Process—Right to Counsel in Criminal Cases

In capital cases, the due process clause of the Fourteenth Amendment requires that the accused shall have benefit of legal counsel in presenting his defense, and the United States Supreme Court will enforce that federal right unless it appears on the record that there was a substantial ground under state law justifying the failure to provide the accused with counsel.

Williams v. *Kaiser*, 89 L. ed. Adv. Ops. 362; 65 Sup. Ct. Rep. 463; U. S. Law Week 4112. (No. 102, argued December 12, 1944, decided January 8, 1945).

The petitioner Williams pleaded guilty to an indictment charging him with robbery by means of a deadly weapon, a capital offense. A trial court in Missouri found him guilty and sentenced him to fifteen years in prison on May 28, 1940. In 1944, Williams petitioned for a writ of *habeas corpus* in the Supreme Court of Missouri, stating, among other facts, that, prior to his conviction, he had requested the aid of counsel but that at the time of conviction he was without the aid of counsel, that the court appointed no counsel, that Williams had not waived his constitutional right to the aid of

counsel, and that he was not capable of making adequately his own defense, in consequence of which he was compelled to plead guilty. He contended that he was deprived of counsel contrary to the requirements of the due process clause of the Fourteenth Amendment. He was permitted to proceed in *forma pauperis,* but the petition was denied for failure to state a cause of action. On certiorari, the Supreme Court reversed in an opinion by Mr. Justice DOUGLAS.

The opinion points out that a Missouri statute requires a court on request to assign counsel to a person unable to employ one, when charged with a felony. The State Supreme Court did not indicate the reasons for its denial of the petition beyond saying that it failed to state a cause of action. The opinion of Mr. Justice DOUGLAS recognizes that the decision of the state court is binding as to questions of state law, but it is pointed out that the right to counsel in cases of this type is protected by the Fourteenth Amendment, and that the question whether that federal right has been infringed is open, even though the court below proceeded on the ground that its statute requiring the appointment of counsel was not violated. And Missouri did not suggest that there was any procedure other than *habeas corpus* for release from imprisonment resulting from an unconstitutional procedure. Moreover, the writ was denied here without requiring the State to answer or giving Williams an opportunity to prove his allegations. Certain presumptions of law are then mentioned and the varying degrees of robbery and related crimes under Missouri law are also enumerated. These are cited as indicating the technical requirements involved, as to which one not skilled in the law would be uninformed and unable to defend himself. The considerations mentioned in *Powell* v. *Alabama,* 287 U. S. 45, are also emphasized as pertinent in the present case. In conclusion the opinion deals with the argument that the denial of the writ may rest upon adequate state grounds. Rejecting this contention, Mr. Justice DOUGLAS says:

> *It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. . . . And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. . . . We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, "it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."*
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> *We can only assume therefore that the denial by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right. That seems to us to be the fair intendment of the language which it used if we put to one side, as we must, the insubstantial state grounds which have been advanced in explanation of the denial. If perchance the Supreme Court of Missouri meant that some reason of state law precludes a decision of the federal question, that question is not foreclosed by this decision. . . . But on the present state of the record before us, we do not see what more petitioner need do to establish the federal right on which his petition is based.*

Mr. Justice FRANKFURTER delivered a dissenting opinion, in which Mr. Justice ROBERTS joined. The dissenting opinion is addressed to the proposition that the petition for certiorari should be dismissed for want of jurisdiction. This view seems to be based chiefly upon the ground that there is nothing in the record to preclude the assumption that the Supreme Court of Missouri found a local inadequacy in the petition for the writ of *habeas corpus.*

Tomkins v. *Missouri,* 89 L. ed. Adv. Ops. 370; 65 Sup. Ct. Rep. 370; U. S. Law Week 4111. (No. 64, argued December 12, 1944, decided January 8, 1945).

Tomkins v. *Missouri* is a companion case to that of *Williams* v. *Kaiser, supra.* Here the prisoner was charged with murder in the first degree. He pleaded guilty and was convicted and sentenced to the penitentiary for life in 1934. His petition for a writ of *habeas corpus* was filed in 1944. Here too the question was whether there had been a denial of due process by reason of the trial court's failure to appoint counsel for the defendant. Here also the State Supreme Court denied the petition for failure to state a cause of action, but without calling upon the state to answer or giving the prisoner an opportunity to prove his allegations. On certiorari the Supreme Court reversed, in an opinion by Mr. Justice DOUGLAS. In finding that a cause of action for a writ of *habeas corpus* is stated in the petition, whose undenied allegations are to be taken as true, Mr. Justice DOUGLAS says:

> *Powell* v. Alabama, *287 U. S. 45, 71, held that at least in capital cases "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." Under that test a request for counsel is not necessary. One must be assigned to the accused if he is unable to employ one and is incapable adequately of making his defense.*
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> *The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law.*
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> * * *

If this petition is read in that light, it satisfies the requirements of Powell *v.* Alabama. . . . *Certainly when we read these allegations with the further assertion in the record that petitioner was at no time prior to conviction allowed to consult with an attorney, the conclusion is irresistible that petitioner was unable to employ counsel either because he was without funds or because he was deprived of the opportunity.*

Mr. Justice ROBERTS and Mr. Justice FRANKFURTER thought the writ should be dismissed for the reasons set forth in their dissent in *Williams* v. *Kaiser*, No. 102.

The case was argued by Mr. John Raeburn Green for Williams and by Mr. Robert J. Flanagan for Kaiser, in No. 102, and by Mr. John Raeburn Green for Tomkins and by Mr. Robert J. Flanagan for the State in No. 64.

Labor Law—Injunctions—Violation of Registration of Organizers—Contempt of Court—Habeas Corpus

A statute which prohibits labor organizers from soliciting memberships for labor organizations without first obtaining an organizer's card, restrains rights of free speech and free assembly.

***Thomas* v. *Collins*,** 89 L. ed. Adv. Ops. 340; 65 Sup. Ct. Rep. 315; U. S Law Week 4097 (No. 14, argued October 11, 1944, decided January 8, 1945).

R. J. Thomas, a labor organizer, solicited members for certain CIO labor organizations without first obtaining an organizer's card as required by a Texas statute. An *ex parte* restraining order was issued by a county district court. After service of the order, Thomas addressed a mass meeting of workers and asked persons present to join a union. For this he was held in contempt and sentenced to a short imprisonment. He filed a petition for habeas corpus. His petition was denied and on appeal to the Supreme Court of Texas the judgment was affirmed. On further appeal to the Supreme Court of the United States, the judgment of the Texas court was reversed.

Mr. Justice RUTLEDGE delivered the opinion of the Court. He declared that the facts are substantially undisputed. After stating the contentions of the parties, Mr. Justice RUTLEDGE says:

The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the state's power begins.

* * *

That the state has power to regulate labor unions with a view to protecting the public interest is, as the Texas court said, hardly to be doubted. They cannot claim special immunity from regulation. Such regulation however, whether aimed at fraud or other abuses, must not trespass upon the domains set apart for free speech and free assembly.

* * *

Thomas went to Texas for one purpose and one only—to make the speech in question. Its whole object was publicly to proclaim the advantages of workers' organization and to persuade workmen to join Local No. 1002 as part of a campaign for members.

* * *

That there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say, there can be no doubt. The threat of the restraining order, backed by the power of contempt, and of arrest for crime, hung over every word.

* * *

. . . The restriction's effect, as applied, in a very practical sense was to prohibit Thomas not only to solicit members and memberships, but also to speak in advocacy of the cause of trade unionism in Texas, without having first procured the card.

* * *

As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the state is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

Mr. Justice JACKSON delivered a concurring opinion. He develops the proposition that whatever else may be said of what Thomas did, whether it was solicitation of membership or something else, it was in essence all a speech and his right to do all that he did was a part of the right of free speech.

Mr. Justice DOUGLAS delivered a concurring opinion. In this opinion he says:

The intimation that the principle announced in this case serves labor alone and not an employer has been adequately answered in the opinion of the Court in which I join.

* * *

No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee. But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses.

Mr. Justice BLACK and Mr. Justice MURPHY joined in this opinion.

Mr. Justice ROBERTS delivered a dissenting opinion in which he says:

The right to express thoughts freely and to disseminate ideas fully is secured by the Constitution as basic to the conception of our government. A long series of cases has applied these fundamental rights in a great variety of circumstances.

Not until today, however, has it been questioned that there was any clash between this right to think one's thoughts and to express them and the right of people to be protected in their dealings with those who hold themselves out in some professional capacity by requiring registration of those who profess to pursue such callings.

* * *

. . . The question before us is as to the power of Texas to call for such registration within limits precisely defined by the Supreme Court of that state in sustaining the statute now challenged.

After stating what is not involved in the attack upon the constitutionality of the Texas statute, Mr. Justice ROBERTS poses what he considers as the only pertinent point of attack and says:

. . . the Act and the injunction which he disobeyed say nothing of speech; they are aimed at a transaction,—that of solicitation of members for a union. This, and this only, is the statutory object which is said to render it unconstitutional.

After analyzing the contention, it is summarized as follows:

Stripped to its bare bones, this argument is that labor organizations are beneficial and lawful; that solicitation of members by and for them is a necessary incident of their progress; that freedom to solicit for them is a liberty of speech protected against state action by the Fourteenth Amendment and the National Labor Relations Act, and hence Texas cannot require a paid solicitor to identify himself.

The dissenting opinion closes with the following paragraph:

We may deem the statutory provision under review unnecessary or unwise, but it is not our function as judges to read our views of policy into a Constitutional guarantee, in order to overthrow a state policy we do not personally approve, by denominating that policy a violation of the liberty of speech. The judgment should be affirmed.

The CHIEF JUSTICE, Mr. Justice REED and Mr. Justice FRANKFURTER joined in this opinion.

The case was argued by Mr. Lee Pressman for Thomas and by Mr. Fagan Dickson for Collins and by Mr. Alvin J. Rockwell for the United States as amicus curiae.

Public Utility Holding Company Act—Dissolution of Holding Company to Effectuate Purpose of Section 11 (b)—Treatment of Preferred Stock.

In a plan filed by a holding company to comply with the provisions of Section 11 (b) of the Holding Company Act, providing for liquidation and dissolution of the company, the treatment of preferred stock is fair and equitable judged through relative treatment of the preferred and common stock providing for continued participation in a going concern, even though the full preferential rights of the preferred stock, as provided by the corporate charter, are not satisfied. The charter provisions as to preferential rights on dissolution are not operative in proceedings under Section 11 (b).

Otis & Co. v. *Securities and Exchange Commission, et al.*, 89 L. ed. Adv. Ops. 460; 65 Sup. Rep. 483; U. S. Law Week 4158. (No. 81, argued on November 17, decided on January 29, 1945).

The United Light and Power Company is a registered holding company subject to the provisions of the Public Utility Holding Company Act, having now outstanding $60,000,000 par value Class A preferred stock and two classes of common stock. The charter provides that: "Upon the dissolution or liquidation of the corporation, whether voluntary or involuntary, the holders of the Class A Preferred stock shall be entitled to receive out of the net assets of the corporation, whether capital or surplus, for each share of such stock, one hundred dollars and a sum of money equivalent to all cumulative dividends on such share, both accrued and in arrears (whether or not the same shall have been declared or earned), including the full dividend for the then current quarterly period, before any payment is made to the holders of any stock other than the Class A preferred stock."

United is the top holding company of a large system and its place in the system violates the prohibition of the Act, known as the "great-grandfather clause", which prohibits a registered holding company from being a holding company with respect to any subsidiary company which is a holding company. The Securities and Exchange Commission directed that Power be liquidated and dissolved and that company submitted a plan which the Commission found to be fair and equitable to all security holders. It approved the plan for the liquidation and dissolution of Power as necessary to effectuate the provisions of Section 11 (b) of the Act. Power's chief asset was the common stock of its subsidiary, United Light and Railways Company, a Delaware corporation. That stock represented over $72,000,000 of Power's gross assets of a little over $81,000,000. The central feature of the plan was the distribution of Power's assets to its preferred and common stockholders. All other assets of Power were to be distributed by it to Railways so that the residual property of Power would inure to the benefit of Railways' new stockholders, the former stockholders of Power.

Power's holdings of common stock in Railways was to be distributed on the basis of 94.52% thereof to Power's preferred stockholders and 5.48% to Power's common stockholders. Since Railways was the only company in the tier below Power in the system, the former would become, by dissolution of Power, the top holding company and Power's preferred and common stockholders, by receiving all of Railways' common, would have in the aggregate the same rights in Railways' and in the holding company's system that Power had.

Otis & Co. contended that the plan was unfair because it distributed some of Power's assets to its common stockholders without fully satisfying the rights of Power's preferred stockholders as set forth in the foregoing provisions of its charter relating to distribution or liquidation. In enforcement proceedings in the District Court, that court sustained the

Commission and the Circuit Court of Appeals affirmed. On certiorari, the ruling was affirmed by the Supreme Court, with three Justices dissenting. The Commission treated the problem as an investment problem calling for determination of the preferred stockholders' rights in the company as a going concern rather than as a question as to what constitutes satisfaction of full priority in liquidation. Considering the relevant factors, including the possibility of future earnings, the Commission concluded that the assumed earnings would be sufficient, in fifteen years, to make up the arrearages on the preferred stock accumulations so that from then on the common would have a basis for participation. Otis & Co. apparently did not challenge the Commission's allocation of values between the common and preferred stock if the Commission was correct in treating the stock rights as though they were in a continuing enterprise rather than in a liquidation. The opinion states that the issue presented is not whether full priority should be given to the preferred over the common stockholders here but whether the charter priority is applicable to simplification proceedings by liquidation under Section 11 (b) (2) and (e). Emphasizing this, Mr. Justice REED says:

> *There is an argument that if the charter provision applies to this situation, it cannot be disregarded and that in such a liquidation "fair and equitable" would require the distribution of assets only to the preferred. We do not reach that question. The point at issue is whether this charter provision applies.*

After reference to the report of the National Power Policy Committee, which the President sent to Congress, Mr. Justice REED proceeds to an analysis of the issue involved in the following portion of his opinion:

> *Distribution to preferred stockholders only with disregard of common's interest would eliminate Power and cure the system's present inconsistency with the great-grandfather clause. We think, however, the charter preference is inoperative in simplification under Section 11 (b) (2). The provision having been adopted in 1929, six years prior to enactment of the Public Utility Holding Company Act, a "simplification" under this Act, having as an incident to it the dissolution of one company in a holding company system, was not an anticipated "liquidation" within the meaning of Power's charter provision. Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. Nor should common stock values be made to depend on whether the Commission, in enforcing compliance with the Act, resorts to dissolution of a particular company in the holding company system, or resorts instead to the devices of merger or consolidation, which would not run afoul of a charter provision formulated years before adoption of the Act in question. The Commission in its enforcement of the policies of the Act should not be hampered in its determination of the proper type of holding company structure by considerations of avoidance of harsh effects on various stock interests which might result from enforcement of charter provisions of doubtful applicability to the procedures undertaken. When preexisting contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate. . . . The reason does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization. It lies in the fact that Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens.*

The dissenting opinion of Mr. Chief Justice STONE points out that the majority opinion adopts a ground in support of its holding which the Commission declined to adopt, and that the decision of the Commission rested upon another ground on which a majority of the Court appear not to rely.

Dealing with the proposition that the liquidation provision of the charter was not intended to apply in the present instance, the dissenting opinion says:

> *We find it difficult to suppose that a stockholder who stipulates for priority upon liquidation, whether voluntary or involuntary, is at all concerned with the particular source of the power which may compel the liquidation of his investment or with the purpose of its exercise. Unless words have lost their meaning, the stipulation for priority in this case cannot fairly be taken not to include any kind of a liquidation which would compel the surrender of the stockholder's investment and force him to sever his connection with the corporation in which he has invested.*
>
> *When the preferred stock of United was issued in 1929 there were numerous statutes, state and federal, which authorized liquidation and dissolution of corporations by government compulsion. . . . It is the veriest fiction to say that investors in corporate securities at that time could not or did not consider the possibility of the addition of a single statute to this list, or that the stockholders of United by the stipulation for priority upon liquidation, voluntary or involuntary, intended to exclude from its operation any method of involuntary liquidation which would affect their interests. To conclude that the present stipulation for priority upon involuntary liquidation did not envisage a liquidation such as this one seems like saying that an insurance policy payable on the*

death of the insured creates no obligation if the insured dies from a disease which was unknown when the policy was written.

The dissenting opinion also rejects the proposition that the Commission has power to override the charter provision prescribing the priority rights of the preferred stockholders saying:

On the argument of this case counsel for the respondent referred to the Commission's action in setting aside the contract as an exercise of its power to "remold" the contract. Whether this characterization of the Commission's action may be thought to render it more palatable to the preferred stockholders whose lawful contract has been set aside by the Commission, it is plain that in the absence of some controlling direction of the statute there are no circumstances here which call for the exercise of any implied power of the Commission or court to readjust or restate the rights of the stockholders without regard to their contract. There is no suggestion that the present stipulation is unlawful, oppressive or inequitable, or subject to any other infirmity; or that it is incapable of being carried out in the present liquidation to which it applies. Hence there is no basis for the exercise of equity powers to adjust the rights of parties to a contract which has been set aside; or for the Commission's argument, which the Court of Appeals below seems to have sustained, 142 F. 2d 411, 419, that the action of the Commission is supportable as an exercise of the judicial power to make an equitable disposition of the rights of the parties to a frustrated contract. . . .

So far as the Commission has authority to liquidate any corporation, liquidation is only a step in the simplification of a holding company system or the elimination of an undesirable holding company, which are the avowed purposes of the Act. The Commission does not reveal how the distribution of the corporate assets, upon which the stockholders have agreed, would hamper the simplification or the elimination of the liquidated company; or how the different distribution ordered by the Commission would facilitate them. It seems wholly irrelevant to the achievement of these, which are the avowed purposes of the Act, whether the stockholders of the dissolved corporation share in its assets in one proportion or another. Neither the Commission, the public, nor the stockholders have any ground for complaint so long as the agreed priority rights to the distributed assets remain unaltered.

Mr. Justice DOUGLAS did not participate.

The case was argued by Mr. Arthur G. Logan and Mr. Robert J. Buckley for Otis, and by Mr. Roger S. Foster and Mr. Donald R. Richberg for the Government.

Summaries

Bankruptcy—Preference—What Constitutes Effective Transfer.

McKenzie v. *Irving Trust Company*, 89 L. ed. Adv. Ops. 389; 65 Sup. Ct. Rep. 405; U. S. Law Week 4137. (No. 188, argued December 14, 1944, decided January 8, 1945).

The trustee in bankruptcy brought suit in a state court in New York to recover $150,000 paid by the debtor to the respondent, Irving Trust Company, which was a creditor of Graves-Quinn Corporation, the debtor. The payment was alleged to be an unlawful preference under §60a of the Bankruptcy Act. The bank moved for summary judgment under the New York Rules of Civil Practice on the ground that the transfer did not occur within four months of the bankruptcy and hence was not a preference under §60a. The proceedings resulted in a ruling by the New York Court of Appeals holding that the transfer was not made within four months of bankruptcy. On certiorari the judgment was affirmed in an opinion by Mr. Chief Justice STONE.

The question for decision as stated in the opinion is "whether a check, made payable to the bankrupt and endorsed and mailed by it to respondent more than four months before bankruptcy, but received by respondent and credited upon the bankrupt's antecedent debt within the four months, is, by the applicable law, a transfer within the four months period, within the meaning of §60a." In answering this question in the negative, the opinion elaborates the factual situation and then notes that the Court of Appeals rested its decision upon two independent grounds. The second of these grounds was that the transfer became complete on the debtor's endorsement and mailing of the check to the bank on November 27, 1940, which was more than four months before the bankruptcy. November 28 was exactly four months prior to the petition in bankruptcy which was filed March 28, 1941. Since the Supreme Court sustained this ground it was unnecessary to pass on the other ground advanced by the New York Court of Appeals.

The opinion emphasizes that what constitutes a transfer and when it is complete within the meaning of §60a of the Bankruptcy Act is a fedaral question because it arises under a federal statute intended to apply uniformly throughout the nation. The opinion proceeds, however, to point out that in the absence of any controlling federal statute, a creditor or bona fide purchaser can acquire rights in property transferred by a debtor only by virtue of a state law and that hence §60a's "apparent command is to test the effectiveness of a transfer, as against the trustee, by the standards which applicable state law would enforce against a good faith purchaser." *Corn Exchange Bank* v. *Klauder*, 318 U. S. 434, 436-7. It is further observed that state standards controlling the effectiveness of a transfer also determine the exact time when a transfer

is deemed to have been made or perfected.

Mr. Justice BLACK dissented without written opinion.

The case was argued by Mr. David Margulas for McKenzie and by Mr. William A. Onderdonk for Irving.

Bankruptcy—Preference—Limitations of Action.

Herget v. *Central National Bank & Trust Company of Peoria*, 89 L. ed. Adv. Ops. 435; 65 Sup. Ct. Rep. 505; U. S. Law Week 4153. (No. 322, argued January 9 and 10, decided January 29, 1945).

Certiorari to determine whether § 11e of the Bankruptcy Act (11 U. S. C. § 29e) bars at the end of two years from the date of adjudication in bankruptcy an action brought by the trustee in bankruptcy under § 60 of that Act to set aside and recover a preferential transfer.

The bankruptcy trustee, by petition, sought to set aside and recover payments totalling over $300,000 alleged to have been made illegally by the bankrupt to the respondent bank within four months prior to the filing of the bankruptcy petition. The District Court dismissed the complaint because the suit was instituted more than two years subsequent to the date of adjudication in bankruptcy and hence was barred by § 11e, and thus overruled the trustee's contention that under Illinois law he was allowed five years within which to bring action and that the five-year limitation period was applicable since it fell within the provision of § 11e allowing suits "within such further time as the federal or state law may permit."

The Circuit Court of Appeals affirmed and on certiorari the judgment was affirmed by the Supreme Court in an opinion by Mr. Justice MURPHY. A review of the legislative history of the limitation provisions in the various bankruptcy acts and the language of Section 11e itself led to the conclusion that it was the intention of Congress to make the two-years limitation applicable to suits to set aside and recover preferences and not to make applicable thereto longer periods of limitation prescribed by other laws in respect to certain other actions.

The case was argued by Mr. William D. Donnelly for Herget and by Mr. Walter H. Moses for the Central National Bank and Trust Company.

Criminal Law—Perjury.

Weiler v. *U.S.*, 89 L. ed. Adv. Ops. 443; 65 Sup. Ct. Rep. 71; U. S. Law Week 4165. (No. 340, argued January 10 and 11, decided January 29, 1945).

Petitioner Leo F. Weiler was convicted of perjury in a federal district court. The indictment charged that his testimony in a prior prosecution for violation of OPA regulations was false. In the prosecution for perjury he insisted that his testimony in the OPA case was true. Witnesses for the Government testified to the contrary.

When the evidence in the perjury trial was completed, the accused requested the trial judge to instruct the jury that the falsity of the defendant's testimony must be established "by the testimony of two independent witnesses, or by the testimony of one witness and corroborating circumstances." The instruction was refused, the Circuit Court of Appeals affirmed.

In granting certiorari review was limited solely to the question whether the trial court erred in denying the charge. The judgment of the district court was reversed.

Mr. Justice BLACK delivered the opinion of the Court.

The Government challenged the rule embodied in the requested charge and asked that it be reexamined and rejected on the ground that the 18th Century Rule "has long since outlived its usefulness and raises an unjustifiable barrier to convictions for perjury."

That argument was rejected with the statement that:

> *The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practise.*

It was further held that the refusal of the trial court to give the requested instruction was error and that the error could not be considered as unprejudicial.

The case was argued by Mr. Peter P. Zion and Mr. Hirsh W. Stalberg for Weiler and by Mr. Herbert Wechsler for the United States.

Criminal Law—Right of Representation by Counsel—Habeas Corpus—Certiorari.

House v. *Mayo*, 89 L. ed. Adv. Ops. 528; 65 Sup. Ct. Rep. 517; U. S. Law Week 4196. (No. —, no oral argument, decided February 5, 1945).

An inmate of the Florida state prison, under sentence for burglary filed in a United States District Court of Florida a petition for habeas corpus. The judge of that court denied that petition and denied a certificate for probable cause for appeal to the Circuit Court of Appeals, application to the Court of Appeals, an application for an appeal in forma pauperis. That also was denied. The case came to the Supreme Court on motion for leave to file petition for certiorari and to file petition for habeas corpus. Laying aside the question raised as to the action of the district and circuit courts, the Supreme Court acting under sec. 262 of the Judicial Code, (28 U.S.C. 377) took the motions and reversed the action of the lower court and held that the district court erred in denying the petition, because reasonable opportunity was denied the accused to consult with his own counsel.

It was also held that the record of the proceedings in the Florida courts do not show that those proceedings involved all the questions affecting the prisoner's constitutional rights, but dealt seriatim with particular questions which embraced only some but not all his rights.

The per curiam opinion concludes as follows:

> *The motions for leave to proceed in forma pauperis and for leave to file the petition for certiorari are granted. The petition for certiorari is granted, the order of the court of*

appeals and judgment of the district court are reversed and the cause is remanded to the district court for further proceedings in conformity to this opinion.

The motion for leave to file a petition for habeas corpus in this court is denied. Ex parte Abernathy, 320 *U. S.* 219; *Ex parte Hawk,* supra.

Mr. Justice Roberts is of opinion that the writ of certiorari should be denied.

Federal Employers' Liability Act—Evidence of Employer's Negligence—Amendment of Complaint After Running of Statute of Limitations. Federal Rules of Civil Procedure—Rule 15(c).

Tiller v. *Atlantic Coast Line Railroad Company,* 89 L. ed. Adv. Ops. 403; 65 Sup. Ct. Rep. 421; U. S. Law Week 4141. (No. 335, argued January 5, decided January 15, 1945).

Petitioner recovered judgment under the Federal Employers' Liability Act in a District Court for the death of her husband on the ground of negligent operation of a railroad car which killed Tiller and because of the Railroad's failure to provide him with a reasonably safe place to work. When the action was first tried the District Court directed a verdict in favor of the Railroad and the Circuit Court of Appeals affirmed. In an opinion delivered by Mr. Justice Black the Supreme Court in 318 U. S. 54 reversed. On remand the complaint, over the Railroad's objection, was amended so as to charge that Tiller's death was caused by the Railroad's violation of the Federal Boiler Inspection Act and Rules and Regulations of the Interstate Commerce Commission prescribed pursuant to that Act. The jury found a verdict for the widow which the District Court refused to set aside. However, the Circuit Court of Appeals reversed. The evidence with respect to the movement of cars was substantially the same at the second trial as it was at the first trial, and on this issue the Supreme Court reaffirms its previous holding that the evidence justified submission to the jury of the issues raised by the original allegations of negligence.

The Circuit Court also reasoned that there was no evidence that the alleged violation of the Boiler Inspection Act was the proximate cause of the accident in whole or in part. This view the Supreme Court rejects and concludes that the evidence was sufficient to warrant a determination by the jury that the alleged violation was the proximate cause of Tiller's death.

The opinion of the Supreme Court also deals with the question whether the District Court properly allowed an amendment of the original complaint whereby it was enlarged to include an allegation of a violation of the Boiler Inspection Act. At the time of the amendment the two-year period prescribed by the statute of limitations had expired. The Court construes §15 (c) of the Federal Rules of Civil Procedure to permit the amendment in question notwithstanding running of the statute of limitations.

The Chief Justice and Mr. Justice Roberts were of the opinion that the decision of the Circuit Court of Appeals should be affirmed.

The case was argued by Mr. J. Vaughan Gary for Tiller and by Mr. Collins Denny, Jr., for the Railroad.

Federal Employers' Liability Act—Assumption of Risk.

Blair v. *Baltimore and Ohio Railroad Company,* 89 L. ed. Adv. Ops. 446; 65 Sup. Ct. Rep. 545; U. S. Law Week 4164. (No. 265, argued January 2 and 3, decided January 29, 1945).

Blair, an employee of the Railroad, recovered verdict and judgment under the Federal Employers' Liability Act in a state court on a complaint which alleged that the Railroad was negligent in failing to provide the employee with reasonably suitable tools and appliances and a reasonably safe place in which to work and reasonably sufficient and competent help and also on the ground of the negligence of other employees of the Railroad who assisted in doing the work. The Railroad moved for judgment notwithstanding the verdict on the ground that there was no evidence of negligence on its part. The motion was denied but the trial court granted a new trial on the ground that while the testimony was sufficient to support a finding that the negligence of the Railroad's employees contributed to the injury, it was not sufficient to show that the injury to Blair resulted from the Railroad's failure to provide adequate equipment or sufficient and competent help.

Both parties appealed to the Supreme Court of Pennsylvania which reversed, holding that Blair had assumed the risk of injury by remaining in the employment and that there was no evidence to support negligence in any respect. Blair was employed to load and unload inbound and outbound freight. At the time that he was injured he was engaged with two other employees in moving three ten inch 1000 lbs. 30-ft. steel tubes. The best available equipment for moving the pipes was a nose truck of the kind commonly used to move freight and luggage. Blair insisted that he and his two co-workers could not unload the heavy pipe but his protest was overridden and he was told to go ahead and do the work or they "would get somebody else that would." On certiorari the Supreme Court reversed in an opinion by Mr. Justice Black. The opinion emphasizes that the mere fact that the petitioner proceeded to do the work after he had complained that the pipe should not be moved in the manner attempted does not, as a matter of law, amount to a voluntary assumption of risk of injury.

The Chief Justice and Mr. Justice Roberts were of the opinion that the judgment should be affirmed.

The case was argued by Mr. J. Thomas Hoffman for Blair and by Mr. Charles J. Margiotti for the Railroad.

Independent Offices Appropriation Act, 1935—Application to Employee of Canal Zone.

United States v. *Townsley*, 89 L. ed. Adv. Ops. 394; 65 Sup. Ct. Rep. 413; U. S. Law Week 4142. (No. 18, argued on December 12, 1944, decided January 15, 1945).

Certiorari to review a ruling of the Court of Claims holding Section 23 of the Independent Offices Appropriation Act, 1935, applicable to government employees of the Canal Zone whose compensation is fixed on a monthly basis, insofar as that Section provides for overtime compensation for services in excess of forty hours per week. The employee was employed by the Panama Canal and paid on a monthly basis at rates fixed by the Governor of the Canal Zone upon recommendation of a wage board. The normal work week consisted of six eight-hour days. After his retirement, the employee asserted a right to compensation under the Act at the rate of time and one-half for all work in excess of forty hours per week. To enforce his claim, he brought suit in the Court of Claims which ruled in his favor. Section 23 of the Act provides:

> *The weekly compensation minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: Provided, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.*

The Supreme Court affirmed in an opinion by Mr. Justice ROBERTS. The opinion sets forth in considerable detail administrative practices and legislative history relied on by the government in opposition to the employee's claim. The Court's conclusion on the matter is that the Court of Claims properly held that § 23 applies in respondent's case and that he is entitled to recover for the overtime he was required to work.

A subsidiary question related to the method of computation. On this question also the Supreme Court sustained the ruling in favor of the employee.

Mr. Justice MURPHY concurred in the result. The CHIEF JUSTICE, Mr. Justice JACKSON and Mr. Justice RUTLEDGE dissented.

The case was argued by Mr. Enoch Ellison for the United States and by Mr. Herman J. Galloway for Townsley.

Interstate Commerce—Power of Interstate Commerce Commission to Establish through Rail-Water Rates and to Require Interchange of Rail Equipment with Water Carrier.

United States et al. v. *Pennsylvania Railroad Company, et al. and Pennsylvania Railroad Company* v. *United States, et al.*, 89 L. ed. Adv. Ops. 428; 65 Sup. Ct. Rep. 543; U. S. Law Week 4167. (Nos. 47 and 48, argued January 8 and 9, decided January 29, 1945).

This opinion deals with the power of the Interstate Commerce Commission to require a through rail-water interstate route and where such a through route is established, to require railroads to interchange cars with water carriers. Seatrain Lines, Inc. is a common carrier of goods by water providing an interstate service between Hoboken, N. J. and Belle Chasse, La., via Havana, Cuba. Shortly after the initiation of the service, a rule was promulgated by the American Railway Association that "Cars of railway ownership must not be delivered to a steamship, ferry, or barge line for water transportation without permission of the owner filed with the Car Service Division." After announcement of that rule, some railroads permitted Seatrain to use their cars but others, including the parties to this proceeding, refused to do so. No railroads, however, refused to permit delivery of their cars to any of the other eleven water lines listed in a circular of the Association as coming within the intendment of the rule.

Proceedings were instituted before the Interstate Commerce Commission which, after hearing, directed the railroads to establish certain through rail-water routes with Seatrain and also to establish joint rates. Later the Commission heard evidence and found that payment of $1.00 a day would be a reasonable charge for Seatrain to pay the railroads while their cars were in Seatrain's possession. The Commission directed the railroads to abstain from enforcing the rules and practices which prohibited the interchange of their freight cars for transportation by Seatrain in interstate commerce. The railroads brought an action to set aside the Commission's order and the District Court set the order aside insofar as it required the railroads to interchange cars destined for carriage by Seatrain outside the territorial waters of the United States, but sustained the order in all other respects. Both sides took a direct appeal to the Supreme Court but the latter, in an opinion by Mr. Justice BLACK, sustained the order of the Commission, thereby reversing judgment in No. 47 and affirming in No. 48. Mr. Justice ROBERTS dissented without written opinion.

So far as the Commission's jurisdiction is concerned, it is sustained upon an analysis of the applicable statutory provisions.

The ruling as to the fairness of the $1.00 per car per day charge, being dependent upon a determination of facts of a complex nature, is sustained because the record shows substantial support in the evidence for the Commission's finding.

The case was argued Mr. Daniel W. Knowlton for the United States and by Mr. John Vance Hewitt for the Railroad.

Interstate Commerce Act—Through Routes and Joint Rates—Prohibition Against Short-Hauls—Exceptions.

Pennsylvania Railroad Company, et al. v. *United States of America, et al.*,

89 L. ed. Adv. Ops. 419; 65 Sup. Ct. Rep. 471; U. S. Law Week 4169. (No. 182, argued on January 11, decided January 29, 1945).

The Interstate Commerce Commission upon complaint of a shipper of mixed feeds ordered certain railroads to establish and maintain through routes to Hagerstown, Md. The effect of the order was to require certain carriers to short-haul themselves. The shipper received grains, mixed them and shipped them out, on milling-in-transit rates. His complaint was based upon the fact that back-hauls incident to the previously existing routes delayed shipments, and while the charge for the back-hauls was reasonable, the addition of this charge to the through rate cut into its margin of profit, which was already small. These factors the shipper claimed deprived it of its rightful competitive relation to other manufacturers of mixed feed. A District Court of three judges dismissed the petition of the railroads for an injunction annulling the Commission's order requiring the railroads to establish and maintain two through routes. On a direct appeal, the judgment was affirmed by the Supreme Court in an opinion by Mr. Justice ROBERTS.

This opinion may be summarized as follows:

The Commission's power in the premises rests on Section 15 (3) and (4) of the Interstate Commerce Act, as amended. The former of these sub-sections authorizes the Commission when it deems it to be "necessary or desirable in the public interest" to establish through routes and joint rates. The other sub-section prohibits the Commission from requiring a line-haul carrier to short-haul itself when a participant in a prescribed through route. But the prohibition against the short-haul contains exceptions, among which is sub-section (b): "unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation. . . ." The chief controversy turns on the interpretation of the quoted exemption from the general prohibition of through routes which involve short hauling. The legislative history of the statutory provision, fully reviewed in the opinion below, is briefly summarized in the opinion of Mr. Justice ROBERTS. On the basis of this history and the language of the Act, the Court sustains the ruling of the Commission and the District Court.

The case was argued by Mr. Joseph F. Eshelman for the Railroad and by Mr. Robert L. Pierce and Mr. C. Y. Hillyer for the United States.

Negotiable Instruments—Forged Endorsements of Government Checks—Bank's Warranty of Prior Endorsements Not Relieved by Negligence of Disbursing Officials of Government.

National Metropolitan Bank v. *United States,* 89 L. ed. Adv. Ops. 386; 65 Sup. Ct. Rep. 354; U. S. Law Week 4118. (No. 161, argued December 13 and 14, decided January 8, 1945).

A clerk in the Paymaster's office of the Marine Corps procured the issuance of 144 government checks, duly signed by authorized disbursing officials. He forged the vouchers which induced issuance of the checks. After their issuance the same clerk forged endorsements of the payees, added his own name as a second endorser, and deposited or cashed the checks at the Anacostia Bank. That bank, without investigation of the genuineness of the payees' signatures, endorsed the checks and sent them to the petitioner bank, which collected them from the government. The forgeries occurred between July, 1936, and November, 1938. Upon discovery of the fraud, the government demanded repayment by the bank of the sums collected, and on refusal of payment, suit was brought to recover the moneys claimed to be due, basing the right of recovery on two counts—breach of warranty of the payees' endorsement, and money paid under a mistake of fact.

The bank admitted collecting the money for account of the Anacostia Bank, after presenting the checks to the government with a stamped endorsement guaranteeing prior endorsements. It then set up a defense: (1) the endorsement did not amount to a guaranty of the payees' signature; (2) issuance of the checks was a warranty that they were not "fictitious", but genuine and issued for a valuable consideration, which warranty was breached; and (3) the government's disbursing agencies neglected to supervise and examine the transactions before and after the checks issued, thereby delaying discovery of fraud, and this neglect, not the bank's guaranty, caused the government's loss.

The District Court of the District of Columbia granted the government's motion for judgment on pleadings, and the Court of Appeals affirmed. On certiorari, judgment was affirmed by the Supreme Court, in an opinion by Mr. Justice BLACK.

Mr. Justice DOUGLAS concurred in the result. Mr. Justice MURPHY did not participate.

The case was argued by Mr. George C. Gertman for the Bank and on motion of Mr. Assistant Attorney General Shea leave was granted Mr. David L. Kreeger to appear and present oral argument pro hac vice for the Government.

Patents—Pleading Defense of Illegal Use

Ira J. McCullough v. *Kammerer Corporation,* 89 L. ed. Adv. Ops. 278; 65 Sup. Ct. Rep. 297; U. S. Law Week 4094 (No. 46, argued December 11, 1944, decided January 2, 1945).

Certiorari was granted on a petition presenting, as a ground of defense, that the patent owner had unlawfully used the patent in suit by granting a license containing restrictions which were stated to be unauthorized by the patent monopoly and contrary to public policy. In a *per curiam* opinion the Court points out that while the answer alleged generally a defense of "unclean hands," it made no mention of the alleged illegal restrictions; that the District Court made no findings or conclusions in respect to them;

and that on appeal the petitioner had assigned no errors with reference to them and the Circuit Court of Appeals did not consider them.

The petition was dismissed on the ground that the only question for which it was granted had not been properly raised, litigated or passed upon below.

The case was argued by Mr. A. W. Boyken for McCullough, and by Mr. Leonard S. Lyon for Kammerer Corporation.

Patents—Royalty Adjustment Act

Coffman v. *Breeze Corporations, Inc., et al,* 89 L. ed. Adv. Ops. 255; 65 Sup. Ct. Rep. 298; U. S. Law Week 4092 (No. 71, argued December 7, 1944, decided January 2, 1945).

The appellant, a patent owner, brought suit to enjoin his licensee from paying to the Government certain accrued royalties, in compliance with orders issued to the licensee by the War and Navy Departments under the Royalty Adjustment Act (35 U.S.C. Supp. III, Sections 89-96). The complaint did not seek a recovery of the royalties, and did not allege that if the licensee complied with the orders, it would be unable to respond to a judgment for the amount of the royalties. The answer denied that any royalties were due the appellant, and alleged that the validity of the Act was therefore immaterial to the licensee.

A court of three judges was convened to hear the cause pursuant to law (28 U.S.C. Sec. 380-a), and the Government was permitted to intervene (28 U.S.C. Sec. 401). Upon motion by the Government, the suit was dismissed for want of equity and of a justiciable case or controversy. The judgment was appealed directly to the Supreme Court and was affirmed.

The opinion of the Court was delivered by the CHIEF JUSTICE. It was held that the appellant has failed to assert any right of recovery at law, or to show that its remedy at law is so inadequate as to authorize equitable relief. The allegations as to invalidity of the Royalty Adjustment Act amount only to an anticipation of a defense against a claim for royalties, which claim was not made, nor defense asserted. The opinion points out that, if contested, the issue of validity of the Act could properly be decided in a suit to recover royalties from the licensee.

Coffman v. *Federal Laboratories, Inc., et al.,* 89 L. ed. Adv. Ops. 261; 65 Sup. Ct. Rep. 303; U. S. Law Week 4094 (No. 485, argued December 7, 1944, decided January 2, 1945).

This is a companion case to No. 71, *Coffman* v. *Breeze Corporations, Inc., et al.* (see above). As in that case, the complaint sought an adjudication that the Royalty Adjustment Act is invalid, and an injunction restraining the licensee, Federal, from complying with orders issued under the Act. In addition, an accounting of royalties due, and judgment therefor, were prayed. The case was heard by a three-judge court, the Government intervening. Upon the Government's motion, the complaint was dismissed, insofar as it sought an adjudication of invalidity of the Act and an injunction against its operation. The plaintiff appealed.

In an opinion by the CHIEF JUSTICE, the judgment was affirmed for the reasons stated in the opinion in the Breeze case. However, the Court pointed out that after the judgment below, the appellee, Federal, filed an answer setting up as a separate defense the royalty adjustment orders complained of by the appellant, whereby the issue of constitutionality may be determined in the further proceedings to be had.

The cases were argued by Mr. James D. Carpenter, Jr., for Coffman and by Mr. Assistant Attorney General Shea for the United States; no appearance entered or briefs filed by Breeze Corporations, Inc., or by Federal Laboratories, Inc.

Taxation — Estate Tax — Payments from Incompetent's Property as Transfer in Contemplation of Death.

City Bank Farmers Trust Company v. *McGowan,* 89 L. Ed. Adv. Ops. 424; 65 Sup. Ct. Rep. 496; U. S. Law Week 4171. (No. 294, argued January 4, decided January 29, 1945.)

A decedent had been adjudged incompetent in 1926 and a committee appointed to administer her property. The incompetent had a large income, was over 70 years of age, had a daughter and three grandsons who were children of a deceased daughter, and several sisters and a brother. She had been accustomed to allow her daughters $6,000, and one of her sisters $500, annually. A large amount of income, far in excess of the needs of the incompetent, had accumulated in the hands of the committee; upon application to the New York court having jurisdiction of the incompetent's estate, the court directed the committee to pay $50,000 annually to the daughter, the same amount to the guardian of the grandchildren, and $2,000 each to all but one of the brother and sisters. Several years later when the incompetent was 77 years old the allowances were increased retroactively and at the time of her death in 1935 the amount which had been so paid exceeded $1,000,000. The Commissioner included the sum in the decedent's gross estate as transfers made in contemplation of death. The administrator paid the deficiency so arising, claimed a refund, and on denial sued in the District Court. The District Court and subsequently the Circuit Court held that the amounts were properly includible except so much as represented annual payments to the daughter and the grandchildren's guardian of $6,000 each and $500 per annum of the payments to collateral relatives.

The Supreme Court in an opinion by Mr. Justice ROBERTS holds that the District Court was correct in excluding the $6,000 per annum amounts from the gross estate and including the balance of the amounts paid to the daughter and grandchildren. It further holds that no part of the payments to collateral relatives, the sisters and brother, should have been included.

Recognizing that the incompetent herself neither made the transfers nor had any motive with respect to them, the Court upholds the finding that the local court substituted itself

for the incompetent and acted upon the same motives and considerations as would have moved her. The transfer was in effect her act and the motive hers, so that it may fall within the provision requiring the inclusion in a decedent's estate of transfers made by the decedent in contemplation of death.

Mr. Justice ROBERTS finds that the evidence supports the Commissioner's determination that the thought of death was the impelling cause for the transfers to the descendants. The facts indicated that the dominant motive was the thought that, as the descendants would inherit her estate and there was a large amount of unneeded income, they might as well enjoy the money now as await her death. As to the collateral relatives, however, the fact was that they were in need of funds for their support and hence the payments to them were not made with any consideration of death as a motive.

The case was argued by Messrs. James Lloyd Derby and J. Seymour Montgomery, Jr. for the administrator and by Assistant Attorney General Samuel O. Clark, Jr. for the Government.

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakley, Dallas, Texas, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Salary Stabilization

The Economic Stabilization Director has made two important changes in the salary stabilization regulations.

One amendment is of great importance to employers who have violated salary restrictions. The government originally imposed a penalty of dubious legality in every case where a wage or salary payment was greater or less than that permitted. This penalty consisted of the disallowance to the employer of the *entire* wage or salary paid to the employee in question. This drastic penalty has now been mitigated. The Board, the Commissioner, or the War Food Administrator may determine that only part of the deduction is to be disallowed "in the light of such extenuating circumstances as are found to be present in each case and all other pertinent considerations." Reg. Sec. 4001.15, as amended December 13, 1944.

The second amendment is a restriction upon the payment of insurance premiums for employees. Ordinarily, such premiums may be paid up to 5% of the employee's "annual wages or salary determined without the inclusion of insurance and pension benefits and without the inclusion of bonus and additional compensation." This provision has been widely used as a method of increasing the economic benefits to key men whose salaries otherwise are more or less frozen. The regulations (as amended December 13, 1944) now provide that such premiums "must be for the benefit of more than a small number of selected employees."

Intercorporate Liquidation—Nonrecognition of Gain

In *Tri-Lakes Steamship Company* v. *Commissioner*, January 22, 1945, the Sixth Circuit reversed the Tax Court and held that the gain realized by a corporation upon the liquidation of its subsidiary under Section 112 (b) (6) of the Internal Revenue Code is not to be recognized ever where the parent corporation receives only cash; the term "property" in Section 112 (b) (6) includes money. The court refused to follow *Stimson Mill Co.*, 46 B.T.A. 141, which held to the contrary.

Trust Income for Dependents

It seems now that Congress enacted a will-o-the-wisp in the 1943 Act. Section 134 of that Act specifically overcame the rule stated by the Supreme Court in the *Stuart* case, by providing that trust income may not be taxed to the grantor merely because he has the discretionary power as a trustee to use the income for the support and maintenance of his minor child, so long as the income is not actually so used. In *O. M. Banfield Estate*, 4 T. C. 29, the Tax Court held, despite this statute, that the existence of such a power may be weighed as a factor in determining whether the grantor is taxable upon the trust income under the *Clifford* rule.

This approach would seem justified by the statement in the Committee reports on the 1943 Act. It would seem, however, that consideration of this factor should be limited to a case where other *Clifford* elements create a borderline case. In a dubious extension of its rule, however, the court has held that this power may be the controlling factor where the other *Clifford* factors are nearly negligible. In *Lewis A. Cushman*, 4 T. C. No. 61, the court (with six dissents) upheld the tax where the only other factor was management control over the corpus of a nonreversionary trust. In *Joel E. Hall*, 4 T. C. No. 60, the court (with four dissents) emphasized this power where the other factors were a remote contingent reversion and the

discretionary power to accumulate or distribute income. As the respective dissents contended, the results in these cases seem to be a circumvention of Congressional intent.

Inventories of Farmers—"Unit-Livestock-Price" Method

The increasing importance of farm income as a subject of federal income tax has induced an important change in the regulations governing farmers' accounting methods. After long insistence upon the straight cost, lower of cost or market, or "farm-price" methods of computing inventories, the Treasury has now granted farmers the election to use a modified cost basis, viz., the "unit-livestock-price" method. This method is applicable only to livestock raised by the taxpayer. If the method is elected, it must be applied to all livestock raised. It provides for the valuation of the different classes of animals in the inventory at a standard unit price for each animal within a class. The classification and unit prices are subject to the approval of the Commissioner; once established, they must be consistently applied in all subsequent years unless changes are approved by the Commissioner. A taxpayer who has been using a cost, or lower of cost or market, method may adopt the "unit-livestock-price" method for taxable years beginning after December 31, 1943, without prior approval by the Commissioner. Reg. Sec. 29.23(c)-6, as amended by T. D. 5423 (Dec. 15, 1944).

As a corollary to the use of this method in the case of livestock raised, the regulations require that purchased livestock be inventoried at cost. If the animals are not mature at the time of purchase, cost is to be increased at the end of each year (except where the animal was purchased during the last six months of that year) in accordance with the established unit price. The regulations permit either specific identification or the "first-in, first-out" rule in the case of purchased animals sold or lost.

The regulations still recognize the taxpayer's option either to inventory or to depreciate draft, breeding, or dairy animals. Under the amended regulations, however, a taxpayer is apparently *required* to inventory such animals if they have been raised by him, and if he has elected the "unit-livestock-price" method for raised animals. Nevertheless this would seem not to affect his option to take depreciation on such animals if they have been purchased. See Reg. Sec. 29.22(a)-7. It is important to note that the election to inventory draft, breeding, or dairy animals deprives the taxpayer of the benefits of the capital gain provisions of I. R. C. § 117(j). See I. T. 3666, I. R. B. 1944-11-11748.

Letters to the Editors

To the Editors:

Recently so many questions have been propounded regarding patents by people from Justices of the Supreme Court to laymen that it would seem proper to submit answers to these questions. Some of these questions are as follows:

(1) Has the Patent Office become a "patent factory"?

Question (1) is answered "no," since the increase in the issue of patents between 1880 and 1933 was due to the increase in population.

(2) What has been the effect of recent hostile "doctrinal trends" upon the issue of patents and the making of inventions?

The answer to the second question is found in the decline of 41½% from 1933 to 1943. This was during the current period of "doctrinal trends" hostile to patents. It shows conclusively that the inventor's answer to the refusal to make good on the patent grant and the promise is to quit inventing, and that he has quit inventing to the extent of 41½% in ten years.

(3) Does the inventor need the incentive of the patent grant to make inventions?

The answer to the third question, therefore, is that the inventor not only needs the patent grant to induce him to invent, but that he will not invent without it.

The answer to questions (4), (5) and (6) is found in the Report of President Roosevelt's Patent Planning Commission and is as follows:

(4) Has our industry in the past been built up on inventions and is the future of new industry dependent thereon?

The patent grant has—

"(2) stimulated American inventors to originate a major portion of the important industrial and basic inventions of the past 150 years;".

(5) Have these hostile trends towards patents affected the armaments and the war?

The patent grant has—

"(5) stimulated creation and development of products and processes necessary to arm the nation and to wage successful war;".

(6) Does the small business man need patent protection during the formative period?

Patents have—

"(7) operated to protect the individual and small business concerns during the formative period of a new enterprise."

(7) Do the engineering and allied professions and occupations need the patent grant?

Patents are a means of capitalizing the engineer's genius; without them his status becomes that of a clerk.

(8) What, if anything, should be done in the premises?

The answer to question (8) is also found in the Report of the President's Patent Planning Commission and by a return to the pre-1933 system of adjudication of patents.

Data and curves thereon show

that the per capita issue of patents in the United States from 1880 to 1933 was unchanged.

The same show that the per capita issue of patents from 1880 to 1933 was substantially constant and that between 1933 and 1943 it fell off 41½%.

This Commission, headed by Mr. Kettering, was appointed by the President to investigate the patent situation and make recommendations to Congress which it did, but so far none of the recommendations have been adopted.

F. O. RICHEY

Cleveland, Ohio

To the Editors:

In the article entitled "The Dumbarton Oaks Proposals," by Grenville Clark, appearing in the December, 1944, number, he says that it would be contrary to all reason and common sense to confer decisively important powers upon an international body in which small states have the same voice and vote as large states.

If the new international organization is to be, not merely a "League to Enforce Peace", but also, and perhaps in the long run more important, a "League to Save Civilization by Eliminating the Causes Leading to War" it is not clear why small States should not have equal powers with large States. The wisdom, self-restraint, spirit of fairness, and disinterestedness of a nation by no means vary proportionately with its size or population. And small States know that in a general war, whichever group wins, the small States lose.

It was not the small nations which made impotent the League of Nations. They were among its most effective members. Given the opportunity by having conferred upon them sufficient powers, they will be among the most effective members of the new international organization.

JAMES M. ROSENTHAL

Pittsfield, Mass.

To the Editors:

The world is today agreed probably as never before that the supremacy of law must be extended to international relations if civilization is to survive. The ultimate object of the Dumbarton Oaks Conference was to devise an organization capable of accomplishing this great end. I venture to suggest two respects in which its proposals could be improved:

(1) The authority of the new organization should extend to all nations; an individual cannot refuse to obey the laws of a state in which he lives. Why should a nation be allowed to refuse obedience to the laws of the world? All should be equally governed by international law, whether they join or refuse to join the proposed organization.

(2) The decisions of the assembly or council should be by majority vote except in special cases where a larger vote may be appropriate. *Unanimity should never be required,* otherwise futility would result.

The question immediately arises: Will powerful nations now agree to accept and perform such decisions? The answer is no, except in two particulars. They will, I think, agree (1) to use force automatically and at once against an aggressor beginning a war; (2) to enforce violations of an agreement to limit armaments. All decisions of the council, assembly or court on other questions should be unenforceable except by public opinion, in the long run the most powerful force of all.

All nations, whether or not members of the world organization, should have full access to court, council or assembly for the purpose of having their grievances or supposed grievances considered and decided on their merits, but would know in advance that any attempt to redress them by force would be immediately opposed, as the Quaker, William Penn, proposed in 1693, by "all the other sovereignties united as one strength."

By this means war would be prevented and if all wrongs were not righted immediately, their investigation and consideration in the calm atmosphere of court or council would have an inevitable tendency toward smoothing out international differences and giving mankind a more harmonious world in which to live.

THOMAS RAEBURN WHITE

Philadelphia

To the Editors:

Mr. Grenville Clark presents in the December AMERICAN BAR ASSOCIATION JOURNAL what seems to me a questionable basis for the representation of States in the proposed amended League of Nations. Population statistics have little relation to the ability or will to carry out the purposes of the association. China and India are obvious examples. For effective cooperation nations must first have established strong political institutions for themselves. Their peoples must possess awareness of the need for action and the ability, both human and material, to act strongly. The most populous nations lack these essentials. On the other hand, the history of national cooperation between the two world wars shows clearly that most of the smaller nations were unable or unwilling to act. They could not even associate themselves effectively in regional groups for joint action. They desired power without responsibility. There is no reason to suppose they have learned their lesson.

In the future as now, effective action will come mainly from the three great powers that are now bringing Germany and Japan to book, assuming that Russia will eventually cooperate against Japanese aggression. In the future as in the past, power should go with responsibility previously determined.

L. A. CHASE

St. Petersburg, Florida

McCarran-Sumners Bill

To Improve the Administration of Justice by Prescribing Fair Administrative Procedure

Re-introduced in the Senate and House of Representatives at the opening of the 79th Congress on January 3, 1945, by Senator Pat McCarran, Chairman of the Senate Judiciary Committee, and Chairman Hatton W. Sumners of the House Judiciary Committee. Hearings on the Bill are expected this Spring in one or both Houses of Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Procedure Act."

DEFINITIONS

SEC. 2. As used in this Act—

(a) AGENCY. — "Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and (2) agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them.

(b) PERSON AND PARTY.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action.

(c) RULE AND RULE MAKING.—"Rule" means the whole or any part of any agency statement of general applicability designated to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) ORDER AND ADJUDICATION.—"Order" means the whole or any part of the final disposition or judgment (whether or not affirmative, negative, or declaratory in form) of any agency, and "adjudication" means its process, in a particular instance other than rule making but including licensing.

(e) LICENSE AND LICENSING. — "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, or other form of permission. "Licensing" means agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, or conditioning of a license.

(f) SANCTION AND RELIEF. — "Sanction" includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of the freedom of any person, (2) withholding of relief, (3) imposition of any form of penalty or fine, (4) destruction, taking, seizure, or withholding of property, (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees, or (6) requirement of a license or other compulsory or restrictive act. "Relief" includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy, (2) recognition of any claim, right, or exception, or (3) taking of other action beneficial to any person.

(g) AGENCY ACTION. — For the purposes of section 10, "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof and including in each case the supporting procedures, findings, conclusions, and reasons required by law.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

(a) RULES.—Every agency shall separately state and currently publish (1) descriptions of its internal and field organization, (2) a statement of the general course and method by which each type of matter directly affecting any person or party is channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations, and (3) substantive regulations adopted as authorized by law and statements of general policy or interpretations framed by the agency. No person shall in any manner be held liable or prejudiced for com-

pliance with such rules or for failure to resort to organization or procedure not so published.

(b) RULINGS AND ORDERS.—Every agency shall publish or make available to public inspection all generally applicable rulings on questions of law and all final opinions or orders in the adjudication of cases except to the extent (1) not utilized as precedents and required by published rule for good cause to be held confidential or (2) relating to the internal management of the agency and not directly affecting public substantive or procedural privileges, rights, or duties.

RULE MAKING

SEC. 4. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—

(a) NOTICE.—General notice of proposed substantive rule making shall be published, including (1) a statement of the time, place, and nature of public rule-making proceedings, (2) reference to the authority under which the rule is proposed, and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except in cases in which rules are required by statute to be made after opportunity for agency hearing, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency, for good cause finds notice and public procedure thereon impracticable because of unavoidable lack of time or other emergency.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner. After consideration of all relevant matter presented the agency shall, upon adoption or rejection of proposals, publish its reasons and conclusions. To the extent that rules are required by law to be made upon the record of an agency hearing, or after opportunity therefor, the requirements of sections 7 and 8 shall apply in place of the prior provisions of this subsection.

(c) PETITIONS.—To the extent that an agency is authorized to issue rules it shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined after opportunity for an agency hearing, except to the extent that there is directly involved any matter subject to a subsequent trial of the law and the facts de novo in any court—

(a) NOTICE.—Persons entitled to notice shall be informed of (1) the time, place, and nature of agency proceedings, (2) the legal authority and jurisdiction under which the proposed proceedings are to be had, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for the settlement or adjudication of relevant issues through (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment and (2), to the extent that the parties are unable to so determine any controversy by consent, hearing and decision upon notice and in conformity with sections 7 and 8. The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 except in determining applications for licenses or where such officers become unavailable to the agency.

(c) SEPARATION OF FUNCTIONS.—No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not prevent the agency from supervising the issuance of process or similar papers or from appearing thereon as a party.

(d) DECLARATORY ORDERS.—The agency is authorized, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

SEC. 6. In connection with any proceedings or authority—

(a) APPEARANCE.—Every interested person shall be accorded the right to appear in person or by counsel or other qualified representative before any agency or its responsible officers or employees to secure information or for the prompt negotiation, adjustment, or determination of any issue, request, or controversy. Every person appearing or summoned in any agency proceeding shall be freely accorded the right to be accompanied and advised by counsel. In fixing the times and places for proceedings, regard shall be had for the convenience and necessity of the parties or their representatives.

(b) INVESTIGATIONS.—No process, requirement of a report, demand for inspection, or other investigative act or demand shall be enforcible in any manner or for any purpose except (1) as expressly authorized by law, (2) within the jurisdiction of the agency, (3) without denying rights of personal privilege or privacy, and (4) in furtherance of requirements of law enforcement. Every person required to submit data or evidence shall be entitled to retain or procure a copy or transcript thereof.

(c) SUBPENAS.—Subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance, necessity, or reasonable scope of the evidence sought. Upon any contest of the validity of a subpena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, including the authority or jurisdic-

tion of the agency, and in any proceeding for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpena accordingly.

(d) DENIALS.—Prompt notice shall be given of the denial in whole or part of any application, petition, or other request of any person. Such notice shall be accompanied by a reference to any further agency procedure available to such person and, except to the extent affirming prior denial, a simple statement of grounds.

(e) EFFECTIVE DATES. — The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) or final and affirmative order (except the grant or renewal of a license) shall precede for not less than thirty days the effective date thereof except as otherwise authorized by law and provided by the agency upon good cause found.

(f) PUBLIC RECORDS.—Matters of official record shall be available to interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

HEARINGS

SEC. 7. In a hearing pursuant to sections 4 or 5—

(a) PRESIDING OFFICERS. — There shall preside at the taking of evidence (1) the agency or (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, state representatives as authorized by statute, or examiners appointed as provided in this Act.

The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Except to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult or receive evidence or argument from or on behalf of any person or party except upon notice and opportunity for all parties to participate. Upon the filing in good faith of a timely and sufficient affidavit of personal bias, disqualification, or conduct contrary to law of any such officer, the agency or another such officer shall after hearing determine the matter as a part of the record and decision in the case.

Subject to the civil-service and other laws not inconsistent with this Act there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to change except that the Civil Service Commission shall generally survey and adjust examiners' salaries in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.

(b) HEARING POWERS. — Officers presiding at hearings shall have power, in accordance with the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, and (8) make decisions or recommended decisions in conformity with section 8.

(c) EVIDENCE.—The proponent of a rule or order shall have the burden of proceeding except as statutes otherwise provide. The conduct of every person or status of any enterprise shall be presumed lawful until the contrary shall have been shown. Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence except that in rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence subject to opportunity for such cross-examination and rebuttal. Any evidence may be received, but no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing or issues, shall constitute the exclusive record for decision in accordance with section 8 and be made available to the parties. The taking of official notice as to facts beyond the record shall be unlawful unless the parties shall both be notified of the facts so noticed and accorded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision. Subordinate officers recommending decisions or making initial decisions shall first receive and consider written and oral arguments submitted by the parties.

(b) SUBMITTALS AND DECISIONS.—

Prior to each recommended decision, initial decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions, (2) exceptions to decisions or recommended decisions of subordinate officers, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended decisions shall be a part of the record, stated in writing, served upon the parties, and include a statement of (1) findings of fact, conclusions of law, and reasons therefor upon all relevant issues of fact, law, or agency discretion presented and (2) the appropriate rule, order, sanction, relief, or denial thereof supported by such findings, conclusions, and reasons.

SANCTIONS AND POWERS

SEC. 9. In the exercise of any power or authority—

(a) IN GENERAL.— No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as specified and authorized by statute.

(b) LICENCES.—In any case, except financial reorganizations, in which a license is required by law and application is made therefor such license shall be deemed granted unless the agency shall within not more than sixty days of such application have made its decision or set the matter for proceedings required to be conducted pursuant to sections 7 and 8 of this Act or for other proceedings required by law. Except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety manifestly require otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

(c) PUBLICITY. — Except as provided by law, no agency publicity reflecting adversely upon any person or enterprise shall be issued other than the public release or availability of texts of authorized documents or statements of the positions of the parties to a controversy.

JUDICIAL REVIEW

SEC. 10. Except (1) so far as statutes expressly preclude judicial review, (2) in proceedings for judicial review in any legislative court, or (3) to the extent that agency action is by law committed to agency discretions—

(a) RIGHT OF REVIEW.—Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section.

(b) FORM AND VENUE OF ACTION. —The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure after resort to any adequate agency relief provided by rule or statute, secure a judicial declaration of rights respecting the validity or application of any agency action. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

(c) REVIEWABLE ACTS.—Every final agency action, or agency action for which there is no other adequate remedy in any court, shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Any agency action shall be final for the purposes of this section notwithstanding that no petition for review, rehearing, reconsideration, reopening, or declaratory order has been presented to or determined by the agency.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to preserve status or rights, afford an opportunity for judicial review of any question of law or prevent irreparable injury, every reviewing court and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or temporarily grant or extend relief denied or withheld.

(e) SCOPE OF REVIEW. So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) direct or compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action found (1) arbitrary, capricious, or otherwise not in accordance with law, (2) contrary to constitutional right, power, privilege, or immunity, (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, (4) without due observance of procedure required by law, (5) unsupported by competent, material, and substantial evidence upon the

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LAW MAGAZINES

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Ottawa, Ontario, Canada; price for a single copy: 75 cents).

LEGAL HISTORY–*"Statutes as Common Law Principles":* Professor William H. Page, of the University of Wisconsin Law School, contributes as the leading article in the July issue of the *Wisconsin Law Review* (Vol. 1944; No. 4; pages 175-213), lately received, an interesting study as to the extent to which English and American courts have drawn upon statutory analogies for decisions in common law or equity. The author traces particularly the use of statutory analogies in the development of the common law respecting the limitation of certain actions, and rights arising out of insurance transactions. He recommends a wider use by judges and attorneys of "principles taken by analogy from legislation." (Address: Wisconsin Law Review, Madison, Wisc.: price for a single copy: 75 cents).

TAXATION: *"Acquisitions to Avoid Income or Excess Profits Tax: Section 129 of the Internal Revenue Code":* An animated, objective and highly useful study of the law and the loop-holes for tax avoidance, is in the December issue of the *Harvard Law Review* (Vol. LVIII–No. 2; pages 196-225), received on February 5. The author is Harry J. Rudick, of the New York Bar. The various devices for lessening tax liabilities through acquiring corporations, property, etc., are analyzed and discussed, in the light of the law as it was for taxable years beginning before January 1, 1944, and as it has been since that date. Mr. Rudick offers specific suggestions for legislative remedy. He is of the opinion that, "with adequate procedure for judicial review, it seems that the Canadian procedure deserves a trial in the United States." (Address: Harvard Law Review, Cambridge 38, Mass.; price for a single copy: 75 cents).

TAXATION – *State and Local Taxes–"Sales and Use Taxes: Collection from Absentee Vendors":* A great deal of interest has been aroused, among such lawyers as have seen it, by Professor Thomas Reed Powell's extensive "note" on the above-quoted subject, in the September number of the *Harvard Law Review* (Vol. LVII, No. 7; pages 1086-1112). Because it depends largely on the distinctions drawn by the Supreme Court in such decisions as the *Dilworth* case (64 Sup Ct. 1023) and the *General Trading* case (64 Sup. Ct. 1028), and because it has proved to be the most useful compilation and analysis available to practitioners on the subject, this department refers to it a bit belatedly, as it first was passed over in order to give space to Professor Powell's "dissent" from the Supreme Court in the fire insurance cases. After surveying what the Court has done to the taxing power of the states and localities, he concludes with this characteristic sentence: "It would be seemly for the states to find Biblical wisdom in ceasing to covet revenue from such of their neighbors' chattels as are the modern counterparts of the ox and the ass known to the Pentateuch". (Address: Harvard Law Review, Cambridge 38, Mass.; price for a single copy: 75 cents).

TAXES–*Powers of Appointment "Taxing Appointive Property":* J. R. Austin of the Des Moines (Iowa) Bar, gives in the November issue of the *Iowa Law Review* (Vol. 30 – Number 1; pages 17-30) a practical analysis of the taxability of appointive property for Federal estate tax purposes under Section 811 (f) of the Internal Revenue Code. He traces the expanding scope of the tax from the time when appointed property was not within its ambit, through the period when only property actually appointed under a general power was taxable, to the present time when property which is merely subject to the exercise of a power is included in the taxable estate. Mr. Austin examines a number of common trust provisions in the light of the new statutory tests of taxability, and makes suggestions which may be helpful to the draftsman attempting to avoid the unwelcome embrace of the tax. Those concerned with the release of powers prior to July 1, 1945 (under the temporary exemption from gift tax liability afforded by Section 452(c) of the Revenue Act of 1942, as amended) may find that the article offers timely assistance. (Address: Iowa Law Review, Iowa City, Iowa; price for a single copy: $1.00).

WILLS – *"Concerted Wills – A Possible Device for Avoiding the Widow's Privilege of Renunciation":* Dean Alvin E. Evans of the University of Kentucky College of Law, in an article entitled as above in the January issue of the *Kentucky Law Journal* (Vol. XXXIII-No. 2; pages 79-101), writes about mutual wills and joint wills, but prefers to call them "concerted wills". As used by Dean Evans, the term implies that the will or wills were made as the result of some understanding, contractual or otherwise, between the testators involved. Whether or not a concerted will is revocable depends upon proof of a contract binding the testator. The effect of a concerted will between husband and wife on the latter's privilege of renunciation is but one of several facets of the "concerted will" which are examined by the author. Others are the requisites as to the nature of the ownership of the property involved in such testamentary schemes, the effects of subsequent marriage or existence of a pretermitted child on such a will, the possibility of repudiation during the lifetime of both testators, the application of anti-lapse statutes, the subjection to the Statute of Frauds of proof of a contract forbidding revocation, and the available remedies for a breach of contract not to revoke. (Address: Kentucky Law Journal, University of Kentucky, Lexington, Ky.; price for a single copy: $1.00).

WORLD WAR II

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one green thing remained, a little oak tree still struggling for life amongst the rubble, an emblem of hope unconquerable.

London Was Told of American Lawyers

The crowd sang "Oh, God Our Help in Ages Past." As the soldiers played it I had to speak. "On the day that you celebrate," I said, "I was the guest of the lawyers of America in the great and honored old city of Philadelphia." I told them how men gathered around the radio in my room and listened to Churchill rallying his people, how you were kind enough to cheer at that time a generous tribute to the people of Britain. Remembering that of all the peoples who speak our tongue, those to whom I spoke probably received the least reward from what we call our Anglo-Saxon civilization, I quoted to them the prophetic words of an American poet written many years ago which seemed to me to fit that memorably solemn occasion:

Ill done and undone,
London so fair
We will build London
Bright in dark air,
Of new bricks and mortar
Beside the Thames bord,
Queen of Island and water
And a house for our Lord,
And a church for us all
And work for us all
And God's world for us all
Even unto this last.

Reminiscences of Great Leaders and of D-Day

I have seen General Eisenhower moving with gentle courtesy amongst troops of truly united nations. I have seen the eagle-eyes of General MacArthur looking out of his window toward the Philippines. I have flown with Australian airmen of the coastal command, and heard them singing "Waltzing Matilda" from the Scilly Isles to the Lizard as they and their Canadian companions returned from patrol over the Bay of Biscay to the broken but merry-hearted City of Plymouth.

Last but not least, as your Chairman has kindly said, I had the great privilege of witnessing the greatest organization this world has ever seen, and the best example of the union of hearts and minds of two nations that it ever will see, the invasion fleet that set out to reach the coast of France on the morning of the great D-day. Your Chairman has asked me to tell you just a little about that.

Joining the Invasion Fleet

At eleven o'clock in the morning of Friday, the second day of June, a large company of us met in a room in the Admiralty in London. We were addressed by three forthright men: one American, two Britishers. We were told in simple and direct language that the day for which the liberator and the tyrant, the oppressor and the oppressed were all waiting, was close at hand. Four years of preparation and planning that began with the retreat from Dunkirk and would end with the fall of Berlin had come to a climax.

The invasion fleet was about to sail to the coast of Normandy. The warships and the larger ships, including infantry landing ships of which the smallest was 2000 tons were 75 per cent British. The greater part of the smaller craft was American. The overall percentage of the 4000 ships employed would be sixty per cent British and forty per cent American. The bombarding forces would bring to bear on the enemy six hundred guns ranging from sixteen-inch to four-inch.

We were told the names of the admirals and captains and of the great ships that we would see, ships that men would long remember—the Nevada, the Arkansas, the Texas, the Tuscaloosa, the Augusta, the Quincy, the Warspite, the Nelson, the Ramilies, the Glasgow, the Belfast; yes, and His Majesty's Canadian ships, Algonquin and Sioux.

We were told of mystery ships we must not talk about, of new types of planes which we must not identify.

Succeeding Where Others Failed

I would like to tell you what was said as we left: "Good luck to you all," said the chief spokesman. "I only wish I were coming with you. Before you go, I would like to tell you what a British admiral said the other day. I'll let you know his name but I don't think he'd like it made public.

'What Philip of Spain tried to do and failed; what Napoleon wanted to do and could not; what Hitler never had the courage to attempt, we are about to do, and with God's grace we shall succeed'."

I haven't time, I am afraid, to tell you more about it except that I don't suppose there was ever such overwhelming might on one side and such weaknesses on the other. It was a marvellous sight to see the ships shepherding the little mine sweepers through "the green fields of the seas that have no pasture," to see how the lights that we laid were bobbing along as we went through our man-made streets and to hear the great zoom of planes all night long. As I said to the people of my own land, they may have roared and thundered for the enemy, but for us they purred because we knew they were ours.

Vivid Memories of the Invasion Landing

I would like to tell you how the great semi-circle started the bombardment on the morning of D-day, of the great flight of gliders dropping parachute troops, of dauntless men rushing the beaches, of the German air attack at night. I saw planes shot down. I shall never forget seeing one plane in flames coming toward the destroyer on which I was. The crew could have saved themselves by bailing out, but had they done so, their pilotless airplane would have hit one of our ships. They took the nobler way. They just dived into the sea and were all lost. It happened in a flash.

Nobody seemed to think much of it at the time. But I noticed that many men spoke about it long afterwards.

On the evening of D-day, between the time of the gliders and sunset I talked with the chief engineer. He spoke of his wife and family in Vic-

toria and his garden and his hopes for Canada after the war. We talked too of the Britain where we were both born and how, as the years passed by, that little island would be sacred to many races who would remember the great flotilla that set out from its shores on the fifth day of June.

We thought, both of us, that we had seen the morning break not only on the coast of France but for all mankind.

"Chief," I said, "many fleets of ships have crossed these waters to bring destruction to innocent people and slavery to the free. This armada is different. It is the first that ever set out to bring freedom to all men."

"Yes, sir," he said, "and that's what makes everybody feel good—and every Canadian glad to be here."

The Flags of Freedom and the Songs of the Exiled

When I looked at the ships that surrounded our little destroyer, I never even bothered to see what flag was flying at the masts. Because I knew they were all moving to their great destiny as part of one united navy, sailing together for the greatest of all earthly purposes, the restoration of human freedom.

In my wanderings I have seen some of the saddest of all sights—the torn flags of freedom flying far from the lands where loving hands had fashioned them. I have heard some of the saddest of all sounds—national anthems sung in exile.

I have witnessed in all parts of the earth thousands of men and women bending uncomplaining to their hard daily toil. I have seen hundreds of thousands of young faces transfigured with their generous acceptance of whatever fate might bring.

I have seen the sons of Canada and the United States walking with the dignity of kings, and the daughters of your land and our land walking and working with the compassion of queens. I do not know whether you have seen the English papers lately. But if you have seen them I think you must be proud to notice the number of tributes that are paid to Americans by our English children and the references to the wonderful courage of your sons in helping to destroy the robot bombs. Perhaps you have seen some of the pictures. I remember one which to me is typical and occurs very often—an American soldier with his arms around a child, calming and comforting its fears.

What a heartwarming little thing it was to read in the papers that in all the Christmas parcels going to American troops overseas, there is to be included one child's toy. That's the America I love.

I have talked with men who escaped from France, from Belgium and from Germany and continue to fight to the end. I have seen men and women looking at their liberators with joy in their eyes. I have listened to the adventures of patriots who journeyed from their occupied homelands to plan their liberation in London.

Inspiration from the Lives and the Deaths of Men

I returned thankful for the inspiration that has come from the lives and deaths of the plain ordinary men and women of this stricken world. In my journeys I never met anyone in England or in the United States or in Australia who wished to be master of another or wanted his country to dominate any other, or passionately desired anything but justice between man and man and nation and nation, or was unwilling to share his substance with the hungry and his strength with the weak.

For I returned with a faith that burns up doubt, the faith voiced by a great Englishman whom I have the privilege to call my friend: "The whole earth is the temple of freedom, and the heavens themselves the dome that covers it. Its spirit moves wherever men are learning to do justice to each other, even at the cost of injustice done. A noise and a shaking there will be as the bones draw together, but a breath is coming from the four winds. The principle that men are responsible to each other is at work, and wherever it works it will grow with exercise. That principle and no other, applied in detail to the facts of their own lives, has produced the constitutions of free nations. It has raised great armies willing to die, that in their dust that principle may live."

A New Visit to the Fighting Fronts

In a very few days' time I shall be seeing something more of the best men in the world, your sons and our sons, for I am leaving this meeting to visit France and Belgium and Holland and Italy and, I hope, Germany. I shall hear the hammering of the Victory Sign on the door of the last European prison house, and the answering shout from within the walls.

Amongst those who bring freedom will be many men whose names are printed on your letterheads and engraved on the brassplates of your offices. I have met many of them already. They are holding a brief for the land that bore them, and fighting the cause of their country in trials far more grim than any we have known in the ordeals of peace.

Can I tell them—I think I can—that the lawyers of this land that has gathered all its strength and struck once again for the rights of man, know that this Republic is a beacon light of hope to the peoples of the earth; that this nation, enriched by the gifts of many races and cleansed by noble agonies and great pities, will be the sentinel of the temple of freedom and the doorkeeper at the gates of mercy?

That you, who have done so much to mold and guard her glorious freedom, are giving and will give all you can of act, word, thought and deed, to the fashioning of the means by which this land and her Allies, and all who are determined that never again shall an armed doctrine set out to enslave the world, shall remain forever united in the blessed labors of peace.

Salute to the Lawyers and Law Students Who Fight For Us

My friends, as I say goodbye to you and thank you, shall we not

join in saluting the lawyers and law students of America, Canada and Britain who today fight for us beyond the seas? You do not need me to tell you how they have borne themselves on hills that once looked hopeless to all but the men who stormed them. Without any words of mine you recall the grey ships keeping watch on grey waters, and the brave men whose world lies within their narrow walls. Every day in our thoughts are your brothers and my brothers who longing to enjoy the gifts of life in the sunshine and willing to share them with all men, are forced by the terrible compulsion of war to carry death in the darkness.

Every day in these momentous days is their triumph. May we hope that the years to come will be their triumph, too.

My young friend, you asked me:
Can youth save the world?
Can the young build here, on this earth a shining house
Out of our hearts, out of our good intentions?
And I made some stupid reply.
I think I said, No.

Now that you are gone I think, as always, of the things I should have said to you.
How youth is a seed falling across the earth,
Blowing over the land, forever blowing, forever falling.

How some of it finds good soil and grows with beauty,
How some of it withers to death among the stones . . .
How youth is a wave, rolling away in all directions,
Part of it to break against rocks, or die on the beaches
Or in the great calms . . .
And yet how the wave itself must rush on, foaming, far out into the distance,
Into the darkness . . .
And the next wave,
And the next,
Forever rising, forever breaking . . .
These are the things I should have told you.
I do not know why I did not remember them.

So spoke one of your American poets the other day. Let you and me in steadfastness share his vision and his faith.

THE RULES OF CRIMINAL PROCEDURE

Continued from page 136

which is competent to pass on, and does in fact adjudicate from day to day, the validity of rulings of trial judges, is lacking in ability to prescribe general procedural Rules to be followed *in futuro*. The knowledge which the Court acquires and the material which it accumulates in performing the first of these related functions has no doubt enabled it to fulfill the other acceptably.

The movement to vest in the courts the power to control their own procedure has in recent years been uniformly gaining ground throughout the English-speaking world. It is sound and salutary and is in the direction of progress. The Federal Rules of Criminal Procedure are an important phase of this movement. When they become effective, substantially the entire field of federal judicial procedure will be covered and governed by Rules of the Court.

During the past few years more than a few of the states have been making progress along the same lines, where needed. It is to be hoped that this advance will be accelerated as a result of the commendable action of the Supreme Court and the satisfactory results thus far from judicial rule-making in the federal judicial system.

BOOKS FOR LAWYERS

(Continued from page 130)

page index of unusual competence and convenience for a practitioner, a working lawyer comes to the conclusion that for the author this was a labor of love on a subject very dear to his heart. Verne A. Zimmer, Director of the Division of Standards of the United States Department of Labor, attests the significance of the book by writing an introduction. After he has devoted more than a score of years exclusively to workmen's compensation, it must be a source of satisfaction to Sam Horovitz to have Dean Roscoe Pound of the Harvard Law School say: "I am impressed with the skill with which he has brought the essentials of this important subject within reasonable compass"; and to have Judge Hugh J. MacIntyre of the Court of Appeals of Georgia say: "I am very much pleased with the book . . . and have already cited it three times in one of my decisions"; and to have Professor Francis I. McCanna of Boston University School of Law comment: "Mr. Horovitz's book is a well arranged, well written, interesting and scholarly work. It is a readable book . . . and as easily understood by a layman as by a lawyer".

JOSEPH BEAR

Boston, Massachusetts

Mid-Year Meeting of House of Delegates Cancelled

The American Bar Association, in compliance with the request of the Government that no conventions be held until the transportation problem becomes less acute, has cancelled the Spring meetings of the House of Delegates and State Delegates called for March 5 and 6, respectively.

The meeting of the Board of Governors which was to have convened in Dallas on March 2 has been postponed until a later date.

Junior Bar Notes

by T. Julian Skinner, Jr., SECRETARY JUNIOR BAR CONFERENCE

In order to provide members of the Junior Bar Conference of the American Bar Association with rather extensive information relative to the activities of the Conference, as well as to acquaint others with such activities, the officers and council of the Conference concluded to publish from time to time a bulletin entitled "The Young Lawyer". The first issue of the bulletin, being the issue of January, 1945, has been distributed to all members of the Conference and to many others. The bulletin contains a brief explanation of its purpose, a short statement of the history of the Conference, brief articles on David A. Simmons, Houston, Texas, President of the American Bar Association, and Charles S. Rhyne, Washington, D. C., National Chairman of the Conference, an explanation of the work of the Conference's present committees on various activities, a summary of certain activities engaged in by state and local Junior Bar groups and other miscellaneous articles. It is felt that the publication of this bulletin will provide means whereby the members of the Conference can be thoroughly acquainted with the activities being performed by the Conference and provide means for publicizing such activities generally. The editor of the bulletin is Sidney S. Sachs, Washington, D. C., who has been assisted by Charles H. Burton, Thomas F. Healy, and T. Julian Skinner, Jr., as associate editors.

Recent restrictions placed by the Federal Government on the holding of conventions and other similar meetings have made it necessary that the annual mid-year meeting of the officers and council of the Junior Bar Conference be cancelled. Normally, this meeting is held along with the mid-year meeting of the House of Delegates of the Association but it is deemed inadvisable for such to be done this year. Whether or not the officers and council of the Conference will hold a mid-year meeting at a later date will depend upon future circumstances, but at the moment the holding of such a meeting at all is considered unlikely. Of course, the annual meeting of the Conference will be held as part of the annual meeting of the American Bar Association (it is our understanding that such meeting has been tentatively set for next September) unless war conditions prevent.

The Conference's Committee on Traffic Courts reports much continued activity. This committee is not only one of the most active in the Conference, but its work rates among the most important. It has long been recognized by the Bar that many persons have their only contact with the Bench and Bar through traffic courts and other courts of inferior jurisdiction. Such being the case it is felt that any improvement in the administration of justice must take into consideration steps to improve the operation of traffic courts and other similar courts. The Conference's committee on the matter has worked continuously with other committees and sections of the American Bar Association. Likewise, it has worked closely with the National Safety Council, with state and local bar associations, and other groups which are vitally concerned with the subject. In order to accomplish something of a tangible nature various traffic court conferences have been sponsored in numerous states throughout the nation. Such conferences provide a means for the problem to be discussed and other plans to be developed for meeting the situation. It is the plan of the committee that these conferences will continue to be held, if governmental restrictions on travel and meetings do not prevent. If, however, they do prevent the holding of traffic court conferences for the time being, these meetings will be resumed as soon as the government finds that circumstances will permit the removal of the restrictions. This important committee is headed by Calvin M. Corey, Las Vegas, Nevada, as chairman, and its work is coordinated by James P. Economos, Chicago, who is serving his second year as secretary of the Committee.

It will be remembered that beginning several years ago the Junior Bar Conference concluded to sponsor the activity known as the Public Information Program. Two years ago, however, when the ranks of the young lawyers were greatly depleted because of the demands of war, the project was adopted by the Association as a whole. Several months ago it was decided that the project should be returned to the Conference and this was done. The National Chairman has consumed much time in setting up a committee organization to handle this activity. A National Public Information Director, several associate directors, and a state director for each state have been appointed and reports which have been received indicate that the committee is now definitely under way with its work. It is the function of the Public Information Program to inculcate in Americans a greater understanding of and deeper devotion to American ideals. The program consists of the sponsoring of talks and of the preparation of articles relating to the administration of justice, the bill of rights, and other similar matters. This activity is recognized as an extremely important one. Thomas F. Healy, Washington, D. C., the National Director, has issued several bulletins to the members of the committee and to others respecting the work of the committee.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term in 1945:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

The states of Indiana and Nevada will each elect a State Delegate to fill vacancies expiring at the adjournment of the 1946 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1945 must be filed with the Board of Elections not later than April 13, 1945. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. In order to be timely, nominating petitions must actually be received at the Headquarters of the Association before the close of business at 5:00 P.M. on April 13, 1945.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group.)

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Nominating petitions will be published in the next succeeding issue of the American Bar Association Journal which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the Journal. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires. State Delegates elected to fill vacancies take office immediately upon the certification of their election.

Board of Elections
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Laurent K. Varnum

Nominating Petitions

Arizona

To the Board of Elections:

The undersigned hereby nominate J. Byron McCormick, of Tuscon, for the office of State Delegate for and from the State of Arizona, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Henry W. Allen, R. H. Armstrong, Ralph Barry, Edwin Beauchamp, Virgil T. Bledsoe, Terrence A. Carson, W. H. Chester, J. Early Craig, Thomas J. Croaff, Robert Denton, William A. Evans, Leon S. Jacobs, Irving A. Jennings, Milton L. Ollerton, Elias M. Romley, Riney B. Salmon, Kenneth S. Scoville, Blain

B. Shimmel, Wm. Spaid, Rawghle C. Stanford, Jr., Matt S. Walton and W. Francis Wilson of Phoenix;

Messrs. Arthur G. Baker, Palmer C. Byrne, T. J. Byrne, A. M. Crawford, Richard Lamson, E. C. Locklear, Charles E. McDaniel, and Joseph H. Morgan of Prescott;

Messrs. Jas. P. Boyle, Paul J. Cella, Archie R. Conner, George R. Darnell, Richard G. Darrow, Evo De Concini, William S. Dunipace, Fred W. Fickett, Samuel H. Fowler, Glenn Ginn, Wm. G. Hall, Ben C. Hill, Gerald Jones, Joseph B. Judge, Cleon T. Knapp, J. D. Lyons, Jr., Robt. A. May, Clifford R. McFall, L. V. Robertson, and John W. Ross of Tuscon.

Nebraska

To the Board of Elections:

The undersigned hereby nominate George H. Turner, of Lincoln, for the office of State Delegate, for and from the State of Nebraska, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Mr. Walter R. Raecke of Central City;

Mr. Earl J. Lee of Fremont;

Mr. Clarence E. Haley of Hartington;

Messrs. Lewis H. Blackledge, P. E. Boslaugh, Charles E. Bruckman, James D. Conway, Edmund Nuss, Grace H. Simpson of Hastings;

Messrs. William I. Aitken, E. F. Carter, Clarence A. Davis, Leonard A. Flansburg, Walter R. Johnson, C. Russell Mattson, Bayard H. Paine, C. Petrus Peterson, C. M. Pierson, Robert G. Simmons, Don W. Stewart, Robert Van Pelt, John J. Wilson, Thomas C. Woods and John W. Yeager of Lincoln;

Mr. Walter D. James of McCook;

Mr. M. E. Crosby of North Platte;

Messrs. Raymond M. Crossman, John P. Dalton, Edward F. Fogarty, Alfred C. Munger, Varro H. Rhodes and G. M. Tunison of Omaha;

Mr. W. B. Sadilek of Schuyler; and

Mr. Robert R. Moodie of West Point.

South Dakota

To the Board of Elections:

The undersigned hereby nominate Roy E. Willy, of Sioux Falls, for the office of State Delegate for and from the State of South Dakota, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Thos. L. Arnold, Ezra L. Baker, Dwight Campbell, E. B. Harkin, Van Buren Perry, F. B. Stiles and R. F. Williamson of Aberdeen;

Messrs. Boyd M. Benson, Irwin A. Churchill and Max Royhl of Huron;

Mr. J. H. Lammers of Madison;

Messrs. Ray F. Drewry, Karl Goldsmith, Robert C. Riter, E. D. Roberts, St. Clair Smith and Ernest W. Stephens of Pierre;

Messrs. Walter G. Miser, George Philip, and Turner M. Rudesill of Rapid City;

Messrs. T. M. Bailey, R. A. Bielski, Gale B. Braighwaite, Herman F. Chapman, J. D. Coon, G. J. Danforth, G. J. Danforth, Jr., Holton Davenport, Ellsworth E. Evans, J. H. Fitzpatrick, Sioux K. Grigsby, Claude A. Hamilton, P. G. Honegger, Verne H. Jennings, E. G. Jones, Robert G. May, John S. Murphy, J. B. Schultz, B. O. Stordahl, John H. Voorhees, F. G. Warren, Rex M. Warren, M. T. Woods and A. Lee Wyman of Sioux Falls;

Messrs. Alan L. Austin, John H. Hanten, D. K. Loucks, Lloyd B. Peterson and Walter Stover of Watertown.

Oklahoma

To the Board of Elections:

The undersigned hereby nominate Albert W. Trice of Ada, for the office of State Delegate for and from the State of Oklahoma, to be elected in 1945 for a three-year term beginning at the adjournment of the 1945 Annual Meeting:

Messrs. Orel Busby, L. H. Harrell, A. M. Kerr and Vernon Roberts of Ada;

Messrs. John G. Hervey, John E. Luttrell, Victor H. Kulp, Maurice H. Merrill and Floyd A. Wright of Norman;

Messrs. James C. Cheek, Paul G. Darrough, J. B. Dudley, Charles E. France, Tom W. Garrett, M. D. Green, John H. Jarman, D. I. Johnston, J. R. Keaton, V. E. McInnis, Leonard H. Savage, Fred E. Suits and Frank Wells of Oklahoma City;

Messrs. Geo. C. Abernathy, Kenneth H. Abernathy, Roscoe C. Arrington, Iris C. Saunders and Chas. E. Wells of Shawnee;

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THE SUPREME COURT

(Continued from page 115)

first hand the uncertainty which has been created as to the permanence of the complex system of rules which form the entire underpinning of our economic system. And I know the unwholesome results of that uncertainty. Industry and commerce will not go forward unless plans can be made in the confidence that the rules are not subject to retroactive change after money has been invested and liabilities incurred. It is no answer to say that the courts are still open to settle such questions. The very possibility of litigation is often enough to balk a proposed transaction, particularly where large sums are involved.

If this uncertainty were unavoidable, there would be no ground for complaint. But it is not. For many years the Supreme Court held to a policy of submerging its minor differences so that it could function more effectively as the final interpreter of the Federal laws. The Court understood the tremendous impact of its most incidental *dicta* on the practices of the business community—the almost unbelievable sensitivity of the Bar to the views expressed even in minority opinions. The Justices recognized dissenting and concurring opinions for what they are—a warning against full reliance on the majority decision, a warning that the minority does not consider the question closed.

Accordingly, special opinions were not written for the mere purpose of debating minor differences. They were rarely filed except in Constitutional cases and almost never except on a clear issue of basic principle. In other words, the "two-party" system prevailed. We now have a nine-party system. The ever-shifting patterns of decision which result from the interaction of nine divergent judicial philosophies have some of the fascination of a toy kaleidoscope. But like the kaleidoscope, their practical utility is somewhat limited.

McCARRAN-SUMNERS BILL

(Continued from page 159)

whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8, or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing.

CONSTRUCTION AND EFFECT

SEC. 11. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to any agency or person. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act. No subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirements of the selection of examiners through civil service shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

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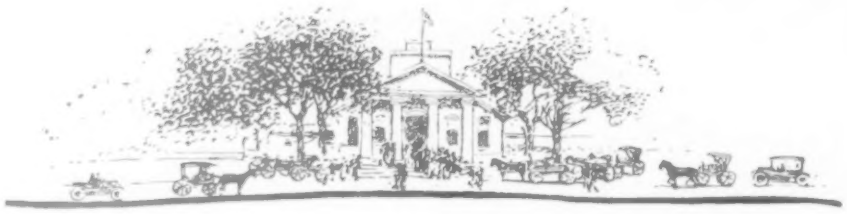

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